UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA, Plaintiff, v. DTE ENERGY COMPANY and DETROIT EDISON COMPANY, Defendants.	Civil Action No. 2:10-cv-13101-BAF-RSW Judge Bernard A. Friedman Magistrate Judge R. Steven Whalen

DEFENDANTS' MOTION TO STRIKE
PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Defendants DTE Energy Company and Detroit Edison Company (collectively, "Detroit Edison"), through their undersigned counsel, submit their Motion to Strike Plaintiff's (United States Environmental Protection Agency, or "EPA") Motion for Preliminary Injunction. In support of this Motion, Detroit Edison respectfully refers the Court to its Brief in Support, filed herewith.

Pursuant to E.D. Mich. LR 7.1(a), on August 17, 2010, Detroit Edison's counsel conferred with counsel for EPA to explain the nature of this Motion and its legal basis, and to request concurrence in the relief requested in this Motion; such concurrence was not forthcoming, thus necessitating the filing of this Motion.

WHEREFORE, Detroit Edison respectfully requests that this Court grant its Motion to Strike EPA's Motion for Preliminary Injunction, or grant such further relief as this Court may deem appropriate.

Respectfully submitted, this 18th day of August 2010.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **DEFENDANTS' MOTION TO STRIKE PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION** was electronically filed with the Clerk of Court using the CM/ECF system, which will automatically send email notification of such filing to the following attorneys of record as follows:

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This 18th day of August, 2010.

/s/ Matthew J. Lund

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UNITED STATES OF AMERICA, Plaintiff, v. DTE ENERGY COMPANY and DETROIT EDISON COMPANY, Defendants.	Civil Action No. 2:10-cv-13101-BAF-RSW Judge Bernard A. Friedman Magistrate Judge R. Steven Whalen

BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO STRIKE PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

STATEMENT OF ISSUE PRESENTED

Whether this Court should strike Plaintiff's Motion for Preliminary Injunction where the Motion was submitted without proper notice or conference with Defendants, seeks permanent relief on issues that require extensive discovery and expert analysis that cannot be fully and fairly accomplished in an expedited manner, and effectively necessitates trial of this dispute in a cursory fashion that significantly prejudices Defendants.

Defendants' answer: Yes.

CONTROLLING OR OTHER APPROPRIATE AUTHORITY

Lowrey v. Beztak Properties, No. 06-13408, 2009 WL 309390 (E.D. Mich. Feb. 3, 2009)

Sanchez v. Esso Standard Oil Co., 572 F.3d 1 (1st Cir. 2009)

University of Texas v. Camenisch, 451 U.S. 390 (1981)

E.D. Mich. Local Rule 7.1(a)

INTRODUCTION

Defendants DTE Energy Company and Detroit Edison Company (collectively, "Detroit Edison") respectfully submit the following brief in support of their motion to strike Plaintiff's (United States Environmental Protection Agency, or "EPA") motion for a preliminary injunction.

EPA filed this lawsuit on August 5, 2010. The Complaint, which contains no allegations of imminent irreparable harm, alleges that Detroit Edison performed work on a coal-fired electric generating unit in Monroe, Michigan, without obtaining certain permits, and without installing what EPA contends to be required additional pollution controls. The Complaint seeks permanent injunctive relief and civil penalties. The lawsuit follows extensive requests for information by EPA, and dialogue between the parties related to the work performed by Detroit Edison on Monroe Unit 2. Notwithstanding ongoing dialogue with Detroit Edison, on August 6, 2010, without proper notification or the pre-filing conference mandated by Local Rule 7.1, EPA filed a Motion for Preliminary Injunction, asking this Court to order Detroit Edison to expend hundreds of millions of dollars on what EPA alleges to be required additional controls on the unit at issue, as well as many millions more on controlling other units on the Detroit Edison system that have nothing to do with the alleged violation or work at Monroe Unit 2. This request for a mandatory injunction comes at this preliminary stage, where neither Detroit Edison nor the Court has the benefit of a developed evidentiary record.

By any measure, this is a complex dispute. Over the past decade, EPA, states and/or citizens have filed at least 30 similar cases involving over 420 utility projects throughout the United States, and EPA—indeed no party—has ever sought resolution through preliminary injunctive relief. There is a reason why this extraordinary relief has never been sought. A case of this nature is an enforcement action that necessitates extensive fact discovery, expert analysis

and extensive briefing before a reasoned resolution may be reached through dispositive motions or a trial on the merits. EPA itself acknowledges that this case "involves the application of a broad and intricate statutory and regulatory framework which has not been commonly litigated in the District." Doc. No. 2 at 1.[1] As discussed below, Detroit Edison would be significantly prejudiced if this Court were to countenance what is an attempt by EPA to enforce its position by ambush. In effect, EPA's motion seeks to establish liability and a permanent remedy without discovery and without the benefit of a trial on the merits. EPA's attempt to try the merits of this case under the guise of a preliminary injunction should be rejected.

BACKGROUND AND PROCEDURAL HISTORY

Given the unprecedented nature of EPA's motion and the substantial relief it seeks, Detroit Edison believes a summary of the background will aid the Court in understanding the issues, the history of EPA's environmental enforcement initiative, and the events that preceded the filing of EPA's lawsuit and motion for a preliminary injunction.

A. Detroit Edison.

Detroit Edison is an energy company headquartered in Detroit, and has provided electricity to Michigan residents and businesses since the early 1900s. Declaration of Skiles W. Boyd ("Boyd Decl.") (Ex. A) at ¶ 3. Detroit Edison's system of generating facilities includes nuclear, hydroelectric, natural gas-fired and coal-fired plants. *Id.* at ¶ 2. The Monroe power plant consists of four coal-fired electric generating units (Units 1-4) placed in service in the early 1970s, and each year produces approximately 35% of Detroit Edison's total electrical power and 44% of its total fossil power. *Id.* at ¶ 3. The Monroe plant is one of the largest employers and

[1] Citations to "Doc. No." in this brief refer to the docket entries on the Court's PACER system.

taxpayers in Monroe County, employing approximately 400 permanent employees and 100 long-term contract employees. *Id.*

Given the current economic climate and the recent heat wave, Detroit Edison recognizes more than ever the importance of providing and maintaining a stream of safe, reliable and affordable electricity to residents and businesses in Michigan. As a regulated public utility under the jurisdiction of the Michigan Public Service Commission, Detroit Edison has a duty to maintain an adequate supply of generating capacity so that electricity is available upon demand at reasonable cost. *Id.* at ¶ 4. The safe, reliable and continued operation of Monroe Unit 2 is a critical component of meeting that demand. *Id.* Monroe Unit 2 alone supplies electricity to over 100,000 residential customers and businesses in southeast Michigan. *Id.*

Though EPA's brief attempts to create the impression that Detroit Edison has supplied this electricity to Michigan residents and businesses in an environmentally irresponsible manner, quite the opposite is true. Detroit Edison has substantially decreased its emissions, including of sulfur dioxide (SO_2) and nitrogen oxides (NO_x), over the years, and is currently decreasing them at an accelerated pace. *Id.* at ¶ 5. At the Monroe plant in particular, Detroit Edison has reduced annual SO_2 emissions by approximately 63% and annual NO_x emissions by approximately 62% since the late 1970s. *Id.* More recently, Detroit Edison has embarked on a $2 billion program to install advanced SO_2 and NO_x controls at Monroe. *Id.* In 2005-2006, Detroit Edison installed a second generation of low-NO_x burners on Monroe Units 1-4 (the first generation Low-NOx burners were installed in the mid-1990s). *Id.* After several years of construction, Detroit Edison started operating Selective Catalytic Reduction ("SCR") systems on Monroe Units 1 and 4 in 2004, and on Unit 3 in 2007; and Flue Gas Desulfurization ("FGD") systems on Monroe Units 3

and 4 in 2009.[2] *Id.* Construction work has already started on FGDs for Monroe Units 1 and 2, with planned final connection and start-up in 2014. *Id.* Finally, Detroit Edison plans to start of construction on the Unit 2 SCR in 2011, with completion and start-up in 2014. *Id.* When Detroit Edison's $2 billion controls plan is complete, all four Monroe units will be operating with low-NO_x burners, SCRs, and FGDs, creating one of the cleanest and most efficient coal-fired power plants in the country. *Id.*

B. The Monroe Unit 2 Work.

A coal-fired boiler is a complex collection of tubes and tube components (*e.g.*, economizers, reheaters and superheaters). Boyd Decl. at ¶ 6. Water is heated and turned to steam, which then turns a turbine to generate electricity. *Id.* Because Detroit Edison's facilities are subject to harsh operating conditions, Detroit Edison must frequently repair and replace deteriorating tubes and related components. Like every other electric utility company in the country, Detroit Edison regularly performs maintenance activities to ensure its units run efficiently and safely—without interruption and without injury to its workforce. *Id.* Like every other utility in the country, Detroit Edison periodically removes its units from service for up to three months to perform this maintenance work. *Id.*

Before commencing this work, Detroit Edison submits a planned outage notification to Michigan's air permitting authority—the Michigan Department of Natural Resources and the Environment ("MDNRE"). *Id.* at ¶ 7. These notifications have been discussed with and are regularly submitted to MDNRE in accordance with the applicable regulations and Detroit Edison policy. *Id.* They explain in detail the scope and purpose of the project, the length of the

[2] SCRs and FGDs are the very types of control equipment that EPA is asking be installed at Monroe Unit 2 as a result of this lawsuit.

particular outage, whether the project will result in any significant increase of emissions from the unit, and whether or not Detroit Edison believes the project is a "major modification" that could trigger permitting obligations under the Clean Air Act ("CAA") which are contained in Michigan's State Implementation Plan ("SIP"). That SIP governs certain emission sources within the State, including Monroe Unit 2, and is administered by MDNRE. *Id.*

In general, these provisions require a utility to obtain a preconstruction permit when a new source is built or when an existing major stationary source constructs a "major modification." *See* 40 C.F.R. § 52.21(b)(2)(i). While there are differences in the details of the definition of "major modification" under the Prevention of Significant Deterioration ("PSD") and Nonattainment New Source Review ("NNSR") programs—the two New Source Review ("NSR") programs at issue here—an inherent part of both definitions is the identification of the kinds of activities that are *not* "major modifications." Projects that constitute "routine maintenance, repair or replacement" ("RMRR") are not "major modifications." *See* 40 C.F.R. § 52.21(b)(2)(iii). Nor are projects that do not result in a significant emissions increase. *See* 40 C.F.R. § 52.21(b)(2)(i).

The work at Monroe Unit 2 involved primarily economizers and reheater replacements. Boyd Decl. at ¶ 8. Detroit Edison sent an outage notification to MDNRE before this work began, explaining why the work was RMRR, and would not result in a significant emissions increase. *Id.*; Letter from Kelly L. Guertin (Detroit Edison) to William Presson (MDNRE) dated March 12, 2010 (Ex. B).[3] Detroit Edison concluded that its planned work did not trigger any

[3] EPA's observation that Detroit Edison's pre-project notification was sent to MDNRE one day before construction commenced requires clarification. Detroit Edison regularly communicates with MDNRE and MDNRE was informed of the Monroe Unit 2 project before the final submission. Boyd Decl. at ¶ 6. Moreover, the applicable rules explicitly provide that such ...continued

permitting obligations under the CAA and/or Michigan's SIP. Ex. B at 3. MDNRE did not question Detroit Edison's determination at the time it received Detroit Edison's notification. Boyd Decl. at ¶ 8. Nor has MDNRE questioned it since that time. *Id.* The work at Monroe Unit 2 commenced on March 13, 2010, and concluded on June 20, 2010. *Id.*

C. EPA's Initial Challenge to the Monroe Unit 2 Work.

Citing a local newspaper article, EPA challenged the Monroe Unit 2 work for the first time on May 28, 2010, stating that the Monroe Unit 2 work constituted a "major modification" under the CAA and Michigan SIP. Letter from Phillip A. Brooks (EPA) to Michael J. Solo (Detroit Edison) dated May 28, 2010 (Ex. C). In that same letter, which EPA sent to Detroit Edison on the Friday before the Memorial Day holiday weekend, EPA demanded that Detroit Edison produce within one business day "any additional information" Detroit Edison believed supported its "contention that the work done during this outage does *not* require a permit." *Id.* at 2. Despite this short period of time, Detroit Edison did its best to respond to EPA's request, and submitted a letter to EPA on June 1 (the day after Memorial Day) explaining the bases for its conclusions. Letter from Michael J. Solo (Detroit Edison) to Sabrina Argentieri (EPA) dated June 1, 2010 (Ex. D). Unsatisfied with this response, EPA responded with a flurry of Section 114 administrative requests for additional information.[4] *See, e.g.*, Letter from Phillip A. Brooks (EPA) to Michael J. Solo (Detroit Edison) June 2, 2010 (Ex. E). Detroit Edison again did its best

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a notification, if required, be submitted "before beginning actual construction." Michigan Air Rule 336.2818. Detroit Edison complied with the applicable Michigan regulation.

[4] In general, Section 114 of the CAA authorizes EPA to request information from any person who owns or operates any emissions source for purposes of, among other things, "determining whether any person is in violation of any ... standard or any requirement" of the CAA. 42 U.S.C. § 7414(a).

to comply, and provided EPA with additional information, usually within one or two days of the request. *See, e.g.*, Letter from Michael J. Solo (Detroit Edison) to Mark Palermo (EPA) dated June 3, 2010 (Ex. F).

EPA issued a formal "Notice and Finding of Violation" ("NOV") to Detroit Edison on June 4, asserting that the outage work at Monroe Unit 2 constituted "major modifications under the [CAA] and the Michigan implementation regulations." EPA NOV (June 4, 2010) (Ex. G). On June 8, EPA informed Detroit Edison that it had "inadvertently left off [its NOV] notice of opportunity to [Detroit Edison] to have a Section 113 conference," and asked Detroit Edison to let EPA know by June 11 if it "is interested having such a conference." Email from Mark Palermo (EPA) to Michael J. Solo (Detroit Edison) dated June 8, 2010 (Ex. H).[5] In response to Detroit Edison's request for a conference, EPA scheduled a conference call for the afternoon of June 16. During a short telephone call, EPA told Detroit Edison that it was not interested in discussing the legal basis for the June 4 NOV or EPA's position regarding the adequacy of the notification that Detroit Edison had provided to MDNRE before the project. Rather, EPA presented Detroit Edison with its demand for substantial emission reductions, both at Monroe Unit 2 and elsewhere, and told the company that it had one week to accept that demand.

D. EPA's Complaint.

EPA filed its Complaint on August 5. Doc. No. 1. EPA did so despite Detroit Edison's indication that, in light of the parties' ongoing dispute, it was managing the operation of Monroe Unit 2 to ensure there would be no increase in annual emissions from the unit for any reason, *i.e.*,

[5] Pursuant to Section 113 of the CAA, any NOV issued by EPA must provide the recipient with an opportunity to conference and present evidence bearing on the finding of violation, on the nature of the violation, and any efforts it may have taken or proposes to take to achieve alleged compliance. 42 U.S.C. § 7413.

even for reasons completely unrelated to the project. Boyd Decl. at ¶ 9. The Complaint asserts that Detroit Edison violated the CAA when it performed the Monroe Unit 2 work without obtaining NSR permits, and seeks injunctive relief and civil penalties. Doc. No. 1 at 2, 15-16.

E. EPA's Enforcement Initiative.

EPA's Complaint is similar to complaints it has been filing against utilities since the waning days of the Clinton Administration, in late 1999, when EPA commenced its "utility enforcement initiative." At that time, EPA filed seven lawsuits against Midwestern and Southern coal-fired utilities and an administrative action against the Tennessee Valley Authority ("TVA"), the federal government's own utility. These actions—which alleged widespread non-compliance with NSR dating back to the 1970s—were based not upon any longstanding interpretation and application of the NSR rules, but upon a new interpretation of the NSR program developed by EPA in the late 1990s. Before EPA launched this initiative, every utility in the country undertook replacement projects similar to the Monroe Unit 2 work to maintain the reliability, efficiency and safety of their generating plants. While these projects were undertaken in full view of EPA, the agency never claimed these projects triggered permitting requirements under the CAA. Before 1999, EPA determined that only *one* project at a utility triggered NSR—a "massive" and "unprecedented" life extension at a Wisconsin Electric Power Company ("WEPCo") plant that was the subject of the decision in *WEPCo v. Reilly*, 893 F.2d 901, 911 (7th Cir. 1990).

Because EPA's positions on the meaning and application of the PSD regulations have been inconsistent, utilities and several states have challenged EPA's enforcement initiative as an unlawful effort to revise the NSR program to create universal liability. In an *amicus* brief filed with the Supreme Court, ten states—Alabama, Alaska, Colorado, Indiana, Kansas, Nebraska,

South Carolina, South Dakota, Virginia and Wyoming—debunked EPA's apparent "elaborate conspiracy theory" that "state environmental agencies" and "every major utility-industry player (and, more particularly, every major player's lawyers) either fundamentally misunderstood or blatantly ignored EPA guidance on the meaning" of the NSR regulations for over twenty years. *Compare* Brief of State of Alabama et al. as *Amici Curiae* at 14, *Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561 (U.S. 2007) (No. 05-848) (excerpts attached as Ex. I) *with* Testimony of Bruce Buckheit before the Senate Democratic Policy Comm. (Feb. 6, 2004) (*available at* http://dpc.senate.gov/hearings/hearing11/buckheit.pdf) (stating that power companies have demonstrated a "cavalier disregard for the law over the past twenty years"). Rather, the states offered the most obvious explanation: "EPA's current litigating position just wasn't the prevailing understanding of NSR/PSD applicability during the two decades that preceded the current enforcement initiative's launch in 1999." Ex. I at 14.

Citing the states' *amicus* brief, the Supreme Court raised but did not decide the question whether EPA's interpretations could be enforced in light of "charges that the agency has taken inconsistent positions" on the meaning of the NSR regulations. *Envtl. Def.*, 549 U.S. at 581-82. At least one district court has said no, and many others have rejected EPA's interpretations under the new NSR program. *See, e.g.. United States v. Duke Energy Corp.*, No. 00-cv-1262, 2010 WL 3023517, at *7 (M.D.N.C. July 28, 2010) ("The EPA is bound by its own interpretation of the PSD regulations, which have consistently referenced industry standards" for RMRR); *United States v. E. Ky. Power Coop., Inc.*, 498 F. Supp. 2d 976, 993 (E.D. Ky. 2007) (holding EPA's narrow interpretation deserves no deference where it "takes an inconsistent view of the regulations, makes inconsistent statements with respect to the regulation, and also enforces the regulation with no discernable consistency").

According to one court, EPA's "zigs and zags represented by its contradictory ... statements and rules" and its failure to speak "with one voice, or a consistent voice, or even a clear voice, on this issue" fatally undermines EPA's claim for deference. *United States v. Ala. Power Co.*, 372 F. Supp. 2d 1283 (N.D. Ala. 2005). That same court characterized EPA's enforcement initiative as a "sport, which is not exactly what one would expect to find in a national regulatory enforcement program." *Id.* at n.44; *see also Duke Energy, supra*, Order Denying Pl.'s Mot. Reconsideration (Feb. 23, 2004) at 3 (noting EPA's propensity to "sp[eak] out of both sides of its mouth" on the issue of NSR applicability) (Ex. J).

Even after EPA changed course in 1999, however, it still did not have its story straight about how it was supposed to apply the NSR program to utilities. Just six months after EPA commenced its enforcement initiative, EPA's enforcement chief conceded that "when you get into [the] question of what's routine, you can find a substantial gray area." Transcript: American Bar Association Update re Clean Air Act, Part 2 (May 23, 2000), 40:4-5, 50:9-11 (emphasis added) (excerpts attached as Ex. K). Not surprisingly, he described EPA's utility enforcement initiative as "[p]erhaps ... *reinvented enforcement.*" *Id.* at 40:4-5 (emphasis added). Indeed, when EPA in 1999 attempted to apply its new NSR positions to TVA in an administrative proceeding, the Eleventh Circuit rejected EPA's effort as a "patent violation of the Due Process Clause" which "lacked the virtues of most agency adjudications." *TVA v. Whitman*, 336 F.3d 1236, 1245-46, 1258-59 (11th Cir. 2003); *see id.* at 1261 (Barkett, J., specially concurring) ("[C]onstitutional due process cannot be provided on an ad hoc basis under the direction and control of the entity whose decision is being challenged."). The court declared EPA's order "legally inconsequential," and directed that "TVA is free to ignore [it]." *Id.* at 1239-40.

Worse, EPA's NSR interpretations continued to fluctuate even as its enforcement initiative progressed. EPA asserted in 2002 that "[w]hether a replacement is 'common in the industry' is *irrelevant* to whether a replacement is routine," *Duke Energy, supra*, EPA's Resp. to Duke's First Req. for Admissions (Dec. 12, 2002) (emphasis added) (Ex. L), despite the fact that EPA explained in the *Federal Register* ten years earlier that the RMRR case-by-case inquiry "*must* be based on the evaluation of whether that type of equipment has been repaired or replaced by sources within the relevant *industrial category*." 57 Fed. Reg. 32,314, 32,326 (July 21, 1992) (emphasis added). And despite its clear *Federal Register* guidance *requiring* use of an "industrial category" test, EPA stated that it did not "perform *any analysis* of whether certain projects it became aware of as part of *this enforcement initiative* [were] common in the industry as a whole." *Duke Energy, supra*, EPA's Opp'n to Duke's Mot. to Determine Sufficiency of Pl.'s Resp. to Duke's First Req. for Admissions (Aug. 4, 2003) at 10 (emphasis added) (Ex. M).

A year later, EPA stated quite differently that EPA "has *long considered* industry practice ... under the interpretation of its routine maintenance exclusion that the United States relies on in this litigation." *United States v. Ala. Power*, No. 01-cv-152-VEH (N.D. Ala.), United States' Reply Regarding the Correct Legal Tests (Oct. 28, 2004) at 55 (emphasis added) (excerpts attached as Ex. N). Then, in 2007, EPA reversed course again, asserting that "EPA *did not* analyze whether similar projects were common in the industry as a whole" in connection with the enforcement litigation. *Duke Energy, supra*, EPA Mem. In. Supp. of Mot. to Vacate (Oct. 4, 2007) at 12 (emphasis added) (excerpts attached as Ex. O). At one point, EPA also stated the CAA "itself *does not* mandate the *narrow* construction" of routine, *United States v. Illinois Power Co.*, No. 99-833 (S.D. Ill.), Plaintiff's Reply to Defendants' Findings of Fact and Conclusions of Law (Sept. 5, 2003) at 3-4 (emphasis added) (excerpts attached as Ex. P), but

later took the opposite view that routine "*must be interpreted narrowly*," *Duke Energy*, *supra*, EPA Mem. in Supp. of Mot. to Vacate (Oct. 4, 2007) at 25 (emphasis added) (Ex. O). To say the least, tracing the history of EPA's statements on PSD is a dizzying exercise. Perhaps this explains why EPA admitted in 2005 that "it can be difficult ... to know with reasonable certainty whether a particular activity would trigger major NSR." 70 Fed. Reg. 61,081, 61,093 (Oct. 20, 2005).

In the enforcement cases that have proceeded to a final judgment after years of discovery, EPA's theories have achieved but limited success. For example, after several years of discovery and two separate liability trials spanning eight days, EPA proved liability on just *six* of 129 NSR violations initially alleged in its and the intervenors' various amended complaints in *United States v. Cinergy Corp.*, No. 1:99-cv-1693-LJM-VSS (S.D. Ind.). Similarly, a district court in this Circuit recently held that projects similar the Monroe Unit 2 work were RMRR. *See Nat'l Parks Conservation Ass'n et al. v. Tenn. Valley Auth.*, No. 3:01-CV-71, 2010 WL 1291335, at *26 (E.D. Tenn. Mar. 31, 2010) ("The Court finds economizer replacements to be common in the industry."), *29 ("The Court finds superheater replacements to be common in the industry."). In fact, the court found all four "*WEPCo* factors"—nature and extent, purpose, frequency, and cost—favored a finding that these projects were RMRR. *Id.* at *24-31.

F. EPA's Motion for Preliminary Injunction.

Nevertheless, EPA continues to insist that projects like the Monroe Unit 2 work trigger permitting requirements under the CAA. In this case, however, EPA has adopted a new strategy. Rather than allowing Detroit Edison an opportunity for discovery, EPA filed a motion for preliminary injunction that would, among other things, order Detroit Edison to immediately begin the process of obtaining NSR permits for the Monroe Unit 2 work, "offset" emissions from

Monroe Unit 2 through reductions of emissions at Detroit Edison's other coal-fired units, submit within 30 days to the Court and to EPA its plan for achieving the annual air pollution reductions required by the order, and install pollution control equipment. EPA Proposed Order at ¶¶ 3-7. As part of this new strategy, EPA pre-packaged its entire case on the merits—both on liability and remedy—and served its motion and brief (without attachments) on Detroit Edison on Friday afternoon, August 6, knowing that Detroit Edison would have just 24 days to respond. E.D. Mich. L.R. 7.1(e)(1)(A) and (B); Fed. R. Civ. P. 6(d) (providing three additional days for mailing). Since 1999, EPA, states and citizen groups have filed at least 30 NSR actions involving over 160 units and 420 projects, and have never sought preliminary injunctive relief for any project alleged to violate NSR. The courts have invariably bifurcated liability and remedy, and they have established schedules spanning years for discovery on liability alone.

This case is more complicated than EPA's brief leads the Court to believe. The issues raised by EPA are not subject to resolution without a developed record, expert testimony, ample opportunity for discovery, and extensive briefing. For example, in another NSR case involving one plant, the parties did not conclude liability discovery until approximately *31 months* after EPA filed its complaint. *United States v. Ohio Edison Co.*, No. 99-1181 (S.D. Ohio) (complaint filed 11/3/1999; close of liability discovery 6/1/2002). Similarly, in an NSR case involving two projects, EPA proposed a discovery period on liability and remedy of over *16 months*. Joint Status Report, *United States v. Louisiana Generating, LLC*, No. 09-100, at 7, 12 (M.D. La) (Ex. Q) (filed June 8, 2009). In an NSR case involving *one* project—as is the case here—EPA agreed to a discovery period on *liability only* of over *14 months*. Joint Status Report and Discovery Plan, *United States v. Ky. Utils. Co.*, No. 07-cv-75, at 2 (E.D. Ky.) (Ex. R) (filed July 31, 2007). Given the time period normally allowed for liability discovery in NSR actions appears to be at

least 14 months, EPA cannot contend that counsel for Detroit Edison should be expected to consult with their client, retain several third-party consultants, and review, prepare and file a meaningful opposition to EPA's motion on liability *and* remedy in *less than one month.* This is especially true during the month of August, when many Detroit Edison employees, the company's lawyers, and potential experts are or will be on pre-planned vacations and geographically dispersed. Moreover, EPA enjoyed unilateral discovery and an advance review of Detroit Edison documents related to the activity now alleged in the Complaint (produced in response to Section 114 information requests, starting months ago).

EPA's motion includes a 36-page brief for which it had sought and obtained an *ex parte* order for additional pages, 22 attachments spanning 494 pages, and a compact disc containing 365 pages and a computer-generated animation. Eight of the 22 attachments consist of lengthy declarations from third-party consultants hired by EPA to support its request for a preliminary injunction, including Lyle Chinkin, Ranajit Sahu, Robert Koppe, Alan Hekking, Bruce Biewald, Myron Adams, Matthew I. Kahal and Joel Schwartz. The declarations amount to full-fledged expert reports on contentious and complex technical issues, and have in every NSR case to this date taken years to develop.

EPA filed and served these extensive materials without even attempting to comply with Local Rule 7.1(a), which requires a moving party to state that "there was a conference between attorneys ...in which the movant explained the nature of the motion and its legal basis and requested but did not obtain concurrence in the relief sought." E.D. Mich. L.R. 7.1(a); *see also* Practice Guidelines for Judge Bernard A. Friedman ("The Court requires strict compliance with

E.D Mich. L.R. 7.1(a) which refers to seeking concurrence of opposing counsel."). The Court should reject EPA's attempt to convert this proceeding into a trial by ambush.[6]

ARGUMENT

I. UNDER THIS COURT'S PRECEDENT, EPA'S MOTION SHOULD BE STRICKEN AS PREMATURE AND PROCEDURALLY IMPROPER.

Though styled as a motion for a preliminary injunction, EPA's motion invites the Court to resolve the issues of liability and remedy at the preliminary injunction stage in the face of sharply contested facts and without the benefit of any discovery. In particular, much of the *final* relief EPA requests in its Complaint is not materially different than the *preliminary* relief EPA seeks in its motion. In its Complaint, EPA requests that this Court:

> Order Defendants to apply for New Source Review permit(s) under Parts C and/or D of Title I of the Clean Air Act, as appropriate, that conform with the permitting requirements in effect at the time of the permitting action, for each pollutant in violation of the New Source Review requirements of the Clean Air Act.

Doc. No. 1 at 15. In connection with its motion for preliminary injunction, EPA requests that this Court:

> [Order] Defendants [to] apply for NSR permits under the Prevention of Significant Deterioration ("PSD") and nonattainment NSR ("NNSR") program for the project performed at Monroe Unit 2 from March to June 2010 ... for the air pollutants for which the project was a major modification under applicable law .... Defendants must obtain the necessary permit applications within 45 days of this Order and diligently pursue obtaining final permits as quickly as possible.

EPA Proposed Order at ¶ 3. In its Complaint, EPA requests that this Court:

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[6] Detroit Edison moves to strike EPA's motion pursuant to the inherent authority of the Court. *See, e.g., Farid v. Bouey*, 554 F. Supp. 2d 301, 313 (N.D.N.Y. 2008) (considering motion to strike defendant's motion to dismiss because "request[ed] relief . . . squarely lies within the inherent authority of the court").

> Order Defendants to take other appropriate actions to remedy, mitigate, and offset the harm to public health and the environment caused by the violations of the Clean Air Act alleged above.

Doc. No. 1 at 16. In its motion for preliminary injunction, EPA requests that this Court:

> [Order] Defendants [to] reduce annual air pollution from the Monroe Power Plant or other coal-fired generating units in their fleet by an amount equal to the unpermitted excess emissions from Monroe Unit 2. The annual obligation to reduce this amount of air pollution shall begin sixty days from entry of this Order ... and continue until Monroe Unit 2 installs pollution controls that meet emissions limits set by NSR permits.

EPA Proposed Order at ¶ 4.

In *Lowrey v. Beztak Properties*, No. 06-13408, 2009 WL 309390 (E.D. Mich. Feb. 3, 2009), this Court adopted Magistrate Judge Morgan's recommendation to deny a similar motion for preliminary junction in part on procedural grounds. *Id.* at *4. There, plaintiffs sued Canton Township for alleged violations of the Americans with Disabilities Act ("ADA"). *Id.* at *5. Plaintiffs alleged that Township facilities violated the ADA because they exceeded slope levels permitted under the Act. *Id.* Plaintiffs requested a preliminary injunction requiring the Township to "[b]ring into compliance with ADA[] ... sidewalks, curb ramps, parking and any other facilities," to construct "ADA[]-compliant parking spaces" in certain areas, and to cease and desist booking new events in these areas until compliance was achieved. *Id.* at *6. In recommending denial of plaintiffs' motion, Magistrate Judge Morgan held the motion was "premature" on "a procedural basis" because "[m]inimal discovery ha[d] been conducted and *no determination by a court* ha[d] been made regarding defendant's liability [under the ADA] or plaintiffs' entitlement to relief." *Id.* (emphasis added). Under these circumstances, the court refused to impose "mandatory duties on a governmental entity including construction of facilities, cancellation of community events, and approval of defendants' future actions contingent on [plaintiffs'] determination." *Id.*

There is no material distinction between the *Beztak Properties* plaintiffs' attempt to bring the Township into compliance with the ADA and EPA's claimed efforts to bring Detroit Edison into alleged compliance with the CAA. Like plaintiffs in *Beztak Properties*, EPA seeks to impose "mandatory duties ... including the construction of facilities" without discovery and without a "determination by [this] Court ... regarding [Detroit Edison's] liability [under the CAA] or *[EPA's] entitlement to relief." Id.* (emphasis added). As noted, EPA's motion seeks an order requiring Detroit Edison to engage in several alleged compliance activities, including applying for and obtaining NSR permits and the installation of costly pollution control equipment even beyond the plant at which the violation allegedly occurred. EPA Proposed Order at ¶¶ 3-4; *see also* Doc. No. 1 at 1 (seeking order requiring Detroit Edison "to take steps to offset the *illegal* pollution from Monroe Unit 2") (emphasis added). Requesting such relief at the preliminary injunction stage is premature.

Detroit Edison does not dispute the Court's authority under Sixth Circuit law to alter the *status quo* when considering a motion for a preliminary injunction. *See United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Reg'l Transit Auth.*, 163 F.3d 341, 348 (6th Cir. 1998). But altering the *status quo* does not extend to awarding *permanent* relief that would only be available upon a final determination of liability, especially when *no* discovery has been conducted and the facts are contested. *See, e.g., Beztak Properties*, 2009 WL 309390, *6; *Brown v. Voorhies*, No. 07-cv-463, 2009 U.S. Dist. LEXIS 110961, *3 (S.D. Ohio Sept. 10, 2009) ("The remedy Plaintiff presently seeks is more than an injunction maintaining the *status quo*; he seeks an Order from this Court *requiring* Defendants to affirmatively correct constitutional deficiencies *yet to be proven.* Such affirmative relief is generally beyond the scope and purpose of preliminary injunctive relief.") (emphases added); *see also Sanchez v. Esso*

Standard Oil Co., 572 F.3d 1, 20 (1st Cir. 2009) ("Because the court's ultimate findings of liability were made before [defendant] had the benefit of the [discovery] process which it was due, the [preliminary] injunction, as issued, cannot stand."); *cf. Helena Chem. Co. v. Huggins*, No. 4:06-cv-2583-RBH, 2007 WL 1725242, at *12 (D.S.C. June 8, 2007) ("In light of the fact this case is in its early stages and discovery has yet to be exchanged between the parties, the court is not in the position to determine the likelihood of success on the merits of either party's case. ... To issue a preliminary injunction under these circumstances would be premature and inappropriate.").[7]

This is particularly true in the NSR context, where the contested issues of fact are rarely resolved on dispositive motions even after *years* of discovery. In *United States v. Duke Energy Corp.*, 278 F. Supp. 2d 619, 622, 638 (M.D.N.C. 2003), *aff'd on other grounds*, 411 F.3d 439 (4th Cir. 2005), *vacated in Envtl. Defense v. Duke Energy Corp.*, 549 U.S. 561 (2007), for example, the court refused to grant EPA summary judgment after two years of liability discovery, "which produced 4.6 million pages of documents, extensive discovery disputes, and numerous pretrial motions," because there was a "genuine issue of material fact as to whether the project ... was non-RMRR." The court held that EPA had not yet provided sufficient "evidence regarding whether the project undertaken ..., given the specific nature and extent, purpose, frequency, and cost of the work, is routine in the electrical industry." *Id.* at 638. Likewise, after approximately 31 months of liability discovery in *United States v. Ohio Edison*, No. 99-CV-1181, 2003 U.S. Dist. LEXIS 25464, at *46 (S.D. Ohio Jan. 22, 2003), the court determined that

[7] Indeed, in an exhibit to its motion, one of EPA's hired consultants implicitly acknowledges that EPA's motion is premature, and the need for factual development and discovery, stating that his "conclusions are still being developed, and could be affected by information or analysis that has yet to be produced." *See* Declaration of Lyle Chinkin at ¶ 4.

"unresolved questions of fact as to the scope and extent of the projects, the treatment of allegedly similar projects undertaken at other plants, and the effect of the projects on the environment render summary judgment *particularly* inappropriate." (emphasis added). And in *Nat'l Parks Conservation Ass'n v. TVA,* 618 F. Supp. 2d 815, 827 (E.D. Tenn. 2010), the court denied the parties' motions for summary judgment because "neither side ha[d] established as a matter of law the applicability or non-applicability of the RMRR exclusion to the specific facts of th[e] case."

Contrary to EPA's motion, the Court cannot impose costly compliance obligations until a *final* judgment of *noncompliance* is entered and EPA demonstrates that it is entitled to the relief it seeks. *Beztak Properties*, 2009 WL 309390, at *6. That has not occurred here, nor could it at this preliminary stage in the case. *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981) ("[I]t is generally inappropriate for a federal court at the preliminary-injunction stage to give a final judgment on the merits."). For these reasons, EPA's motion is procedurally improper and should be stricken.

II. UNDER THIS COURT'S PRECEDENT, EPA'S MOTION SHOULD BE STRICKEN FOR FAILURE TO COMPLY WITH LOCAL RULE 7.1.

EPA's motion should also be stricken because it fails to comply with Local Rule 7.1(a). Under that rule, EPA was required to seek concurrence from counsel for Detroit Edison prior to filing its motion, explain the legal basis for it, and include a statement that such concurrence was sought and denied. *See* E.D. Mich. L.R. 7.1(a); *see also* Practice Guidelines for Judge Bernard A. Friedman ("The Court requires strict compliance with E.D. Mich. LR 7.1(a) which refers to seeking concurrence of opposing counsel."). EPA failed to comply with any of these requirements. As such, the Court should strike EPA's motion for this reason as well. This Court has recently denied motions under Local Rule 7.1(a) for less egregious conduct than EPA's.

Innovation Ventures, LLC v. N.V.E., No., 08-11867, 2010 WL 1923790, at *5 (E.D. Mich. May 12, 2010) (denying motion for summary judgment in part because defendant's counsel sought concurrence but "refused to provide further detail or allow counsel for Plaintiff to review the motion"); *see also Brown v. VSI Meter Servs.*, No. 09-11449, 2010 U.S. Dist. LEXIS 38605, *3 (E.D. Mich. Apr. 20, 2010) (Whalen, J.) (denying motion to compel for failure to comply with Local Rule 7.1(a)).

CONCLUSION

EPA should not be permitted to wage a campaign that is nothing more than an effort to convert a hearing on preliminary relief into a final trial on the merits. Because EPA's motion is premature and procedurally improper and was filed in violation of Local Rule 7.1(a), the Court should strike it.

Respectfully submitted, this 18th day of August 2010.

/s/ Matthew J. Lund

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO STRIKE PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION** was electronically filed with the Clerk of Court using the CM/ECF system, which will automatically send email notification of such filing to the following attorneys of record as follows:

Ellen E. Christensen
U.S. Attorney's Office
211 W. Fort Street
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Detroit, MI 48226
313-226-9100
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U.S. Department of Justice
Environmental and Natural Resource Div.
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I further certify that I have mailed by United States Postal service the paper to the following non-ECF participants:

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Apple Chapman
Attorney Adviser
United States Environmental Protection Agency
1200 Pennsylvania Ave. NW
Washington D.C. 20460

This 18th day of August, 2010.

/s/ Matthew J. Lund

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA,

Plaintiff

v. Civil Action No. 2:10-cv-13101

DTE ENERGY COMPANY and
DETROIT EDISON COMPANY,

Defendants.
_____/

INDEX OF EXHIBITS TO DEFENDANTS' BRIEF TO STRIKE PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Exhibit A	Declaration of Skiles W. Boyd
Exhibit B	March 12, 2010 letter
Exhibit C	May 28, 2010 letter
Exhibit D	June 1, 2010 letter
Exhibit E	June 2, 2010 letter
Exhibit F	June 3, 2010 letter
Exhibit G	June 4, 2010 NOV
Exhibit H	June 8, 2010 letter
Exhibit I	Amicus Brief
Exhibit J	February 23, 2004 Order
Exhibit K	ABA Transcript
Exhibit L	EPA Response to Request for Admissions
Exhibit M	August 4, 2003 EPA Opposition

Exhibit N	October 4, 2004 Reply
Exhibit O	EPA Motion to Vacate dated October 4, 2007
Exhibit P	EPA Reply dated September 5, 2003
Exhibit Q	Joint Status Report
Exhibit R	Joint Status Report

EXHIBIT A TO DETROIT EDISON'S BRIEF IN SUPPORT OF MOTION TO STRIKE

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA, Plaintiff, v. DTE ENERGY COMPANY and DETROIT EDISON COMPANY, Defendants.	Civil Action No. 2:10-cv-13101-BAF-RSW Judge Bernard A. Friedman Magistrate Judge R. Steven Whalen

DECLARATION OF SKILES W. BOYD

I, Skiles W. Boyd, depose and say the following, based upon my own personal knowledge:

1. Since 1978, I have been employed by Detroit Edison Company ("Detroit Edison"), a wholly owned subsidiary of DTE Energy. Over the past several years, I have been generally responsible for managing the Environmental Management and Resources Organization for Detroit Edison's enterprise including all of the environmental issues related to Monroe Unit 2, a coal-fired generating unit located at Detroit Edison's Monroe plant in Monroe, Michigan. My current position is Vice President of Environmental Management and Resources.

2. In that capacity, I am a member of a management team that is responsible for ensuring a reliable and affordable supply of electricity to more than 2 million homes and businesses throughout southeastern Michigan. Detroit Edison serves this customer demand with a diverse mix of generating sources in Michigan totaling nearly 10,000 megawatts of capacity, including seven coal fired stations, two natural gas-fired stations, one nuclear station, and one hydroelectric station.

3. Detroit Edison's Monroe plant is located near Detroit, Michigan, where it has operated safely for nearly 40 years. It consists of four coal-fired electric generating units (Units 1-4) placed in service in the early 1970s, and each year produces approximately 35% of Detroit Edison's total electrical power and 44% of its total fossil power. The Monroe plant is one of the largest employers and taxpayers in Monroe County, Michigan, employing approximately 400 permanent employees and 100 long-term contract employees. Monroe County, however, remains one of the hardest hit areas in the United States during the recent economic recession, with unemployment rates recently reaching 16%.

4. As a regulated public utility under the jurisdiction of the Michigan Public Service Commission, Detroit Edison has a number of obligations. Among these obligations is the duty to maintain an adequate supply of generating capacity so that electricity is available upon demand at reasonable cost. A critical and necessary component of meeting that demand is the safe, reliable and continued operation of Monroe Unit 2. Monroe Unit 2 is a 795 MW unit that alone is responsible for serving over one hundred thousand residential customers and business in the region.

5. While providing this safe and reliable electricity at a reasonable cost, Detroit Edison also has substantially decreased its emissions, including of sulfur dioxide (SO_2) and nitrogen oxides (NO_x), over the years, and is currently decreasing them at an accelerated pace. At the Monroe plant in particular, Detroit Edison has reduced annual SO_2 emissions by approximately 63% and annual NO_x emissions by approximately 62% since the late 1970s. More recently, Detroit Edison has embarked on a $2 billion program to install advanced SO_2 and NO_x controls at Monroe. In 2005-2006, Detroit Edison installed a second generation of low-NO_x burners on Monroe Units 1-4 (the first generation Low-NOx burners were installed in the mid-

1990s). After several years of construction, Detroit Edison started operating Selective Catalytic Reduction ("SCR") systems on Monroe Units 1 and 4 in 2004, and on Unit 3 in 2007; and Flue Gas Desulfurization ("FGD") systems on Monroe Units 3 and 4 in 2009. Construction work has already started on FGDs for Monroe Units 1 and 2, with planned final connection and start-up in 2014. Finally, Detroit Edison plans to start construction on the Unit 2 SCR in 2011, with completion and start-up in 2014. When Detroit Edison's $2 billion controls plan is complete, all four Monroe units will be operating with low-NO_x burners, SCRs, and FGDs, creating one of the cleanest and most efficient coal-fired power plants in the country.

6. As Vice President of Environmental Management and Resources, I am familiar with the purpose of the recent maintenance and repair work at Monroe Unit 2, which I understand is at issue in this litigation. In particular, a coal-fired boiler is a complex collection of tubes and tube components (e.g., economizers, reheaters and superheaters) in which water is heated and turned to steam, which then turns a turbine to generate electricity. Because Detroit Edison's facilities are subject to harsh operating conditions, including high temperatures and pressures, and must be available to provide electricity on demand, Detroit Edison frequently repairs and replaces deteriorating tubes and related components. Like every other electric utility company in the country, Detroit Edison thus regularly performs maintenance, repair and replacement activities to ensure its units run efficiently and safely and with minimal interruption of service and without injury to its workforce. To perform these activities, Detroit Edison, like every electric utility company in the country, periodically removes its generating units from service for up to three months to perform maintenance work, which cannot otherwise be completed with the unit in operation. This maintenance activity is scheduled to occur during

periods when the demand for electricity is less, like certain periods in the spring, so as to avoid the risk of interruption of service to our customers.

7. Before commencing such work, Detroit Edison submits a detailed planned outage notification to the Michigan Department of Natural Resources and the Environment ("MDNRE"), Detroit Edison's state permitting authority. These notifications, which have been discussed with and are regularly submitted to MDNRE in accordance with the applicable regulations and with Detroit Edison policy, explain the scope and purpose of the project, the length of the particular outage, whether the project will result in any significant increase of emissions from the unit, and whether or not Detroit Edison believes the project triggers any permitting obligations under the Clean Air Act and/or Michigan's State Implementation Plan, which govern certain emission sources within the State, including Monroe Unit 2. Detroit Edison regularly communicates with the MDNRE, and MDNRE was informed of the Monroe Unit 2 project before the final submission.

8. With respect to the work at Monroe Unit 2, which involved primarily economizers and reheater replacements, Detroit Edison sent such an outage notification to MDRNE before the work began, and explained why these activities (1) constituted routine maintenance, repair and replacement under EPA's historic and Michigan's interpretation of that term; and (2) would not result in a significant emissions increase. For these two independent reasons, Detroit Edison further explained that the work did not trigger any permitting obligations under the Clean Air Act and/or Michigan's State Implementation Plan. MDNRE did not question Detroit Edison's determination at the time it received Detroit Edison's notification. Nor has MDNRE questioned it since that time. The work at Monroe Unit 2 commenced on or about March 13, 2010, and concluded on June 20, 2010. Monroe Unit 2 is currently operating.

9. In light of the parties' ongoing dispute and to alleviate any concern regarding any potential actual emission increases from Monroe Unit 2 during the dispute, barring unforeseen emergency circumstances, Detroit Edison will manage the operation of the unit to assure there is no increase in annual emissions from Monroe Unit 2 for any reason, even those clearly allowed by the regulations.

I declare under perjury that the foregoing is true and correct.

Executed this 17th day of August, 2010.

Skiles W. Boyd

Skiles W. Boyd

Subscribed and sworn to before me on August 17, 2010.
Karyn Beth Teal

KARYN BETH TEAL
NOTARY PUBLIC, STATE OF MI
COUNTY OF MACOMB
MY COMMISSION EXPIRES Jul 21, 2011
ACTING IN COUNTY OF Wayne

EXHIBIT B TO DETROIT EDISON'S BRIEF IN SUPPORT OF MOTION TO STRIKE

DTE Energy Company
One Energy Plaza, Detroit, MI 48226-1221

DTE Energy

VIA CERTIFIED MAIL

March 12, 2010

Mr. William Presson, Acting Section Supervisor
Permit Section
Air Quality Division
Michigan Department of Environmental Quality
525 W. Allegan
Constitution Hall - 3rd Floor North Tower
P.O. Box 30260
Lansing, MI 48933

Re: **2010 Planned Outage Notification - Monroe Power Plant (B2816), Unit 2**

Dear Mr. Presson:

DTE Energy periodically removes its generating units from service for up to three months to perform maintenance, repair, and replacement activities that cannot otherwise be done with the unit in operation. Typically, this occurs on a 2-3 year cycle. Occasionally a unit is taken out of service for a planned shorter duration to perform less extensive work. During the upcoming twelve (12) week outage at the Monroe Power Plant on Unit 2 that begins on or about March 13, 2010, the following major projects are being undertaken: (1) boiler system repairs and replacements; (2) turbine repairs and replacement; (3) electrical repairs and replacement; and (4) draft system repairs and replacement. These project are exempt under Michigan air rules and no permitting activity is required (see Attachment A). In the electric utility industry, these projects represent routine maintenance, repair and replacement activities.

We are providing notice that these projects are taking place based on the recently promulgated Michigan Prevention of Significant Deterioration (PSD) rules [R336.2801-2830] that became effective on December 4, 2006. Prior planned outage notifications were submitted under the federal New Source Review (NSR) rules promulgated on December 31, 2002 and that became effective in Michigan on March 3, 2003 (the 2002 rules). The 2002 rules required notification, additional record keeping, and annual reporting whenever *"there is a reasonable possibility that a project that is not a part of a major modification may result in a significant emissions increase...."* For the reasons discussed below, DTE Energy continues to believe there is no reasonable possibility that the proposed project will result in a significant emissions increase and thus, the requirements do not apply. However, until USEPA and/or the federal courts provide a clear definition of what constitutes routine maintenance, repair and replacement, DTE Energy will follow the requirements of Michigan Air Rule 1818(3). Accordingly, this outage notification for Monroe Unit 2, and all subsequent outage notifications submitted by DTE Energy will continue to follow the format of prior notifications, even though there is no expected increase in emissions as a result of the planned projects. We continue to believe this notice is not required by federal or state regulations.

The NSR applicability test requires a comparison of past actual and projected emissions. *"Baseline actual emissions"* are defined in Michigan Air Rule (MAR) 1801(b). The baseline period for defining past emissions for Monroe Unit 2 was originally established for the 12 week outage in February 2005 to be the two-year period in calendar years 2000-2001. That baseline is being replaced for this periodic outage. The new baseline is May 2005-April 2007. Net generation and capacity factor data for the new period were obtained from the DTE Energy Power Plant Performance Management (P3M) system records. Particulate emissions were based on fuel characteristics and EPA emission factors. Heat input, sulfur dioxide, and nitrogen oxide emissions were obtained from continuous emission monitoring system (CEMS) data presented in the EPA Annual Acid Rain Scorecard reports. Baseline emissions and other operating characteristics are shown in Table 1.

"Projected actual emissions," as defined in MAR 1801(ll), are also shown in Table 1, along with a comparison of projected and baseline actual emissions. This comparison shows that the projects will not result in an emissions increase. The projected actual emissions in Table 1 were calculated as follows: First, PROMOD projections (production cost model output) were calculated based on the unit's expected post-outage maximum annual utilization during the period 2010-2014 with fuel characteristics similar to the baseline period. The expected post-outage maximum annual utilization (estimated to occur in 2013) was obtained from the PROMOD analysis contained in the 2010 PSCR Annual Report issued on September 10, 2009 as required by the Michigan Public Service Commission. As required under the new rules we then excluded from the PROMOD projections *"...that portion of the unit's emissions following the project that an existing unit could have accommodated ... and that are also unrelated to the particular project," including increases due to demand and market conditions or fuel quality per MAR 1801(ll)(ii)(C).* (See Table 1)

It should be pointed out that emissions and operations fluctuate year-to-year due to market conditions and in any individual year could very well exceed baseline levels. Obviously, since the baseline represents a 2-year average, one of those years was above the baseline and one below. At some point in the future, baseline levels may be exceeded again, but not as a result of this outage. Future unit utilization is also a function of expected electricity market conditions. Many factors influence market demand – weather, availability of other units, transmission limitations, electrical system security, etc. Moreover, fuel quality could change. As mentioned above, the Michigan air rules direct one to exclude from projected actual emissions "...that portion of the unit's emissions following the project that an existing unit could have accommodated ... and that are also unrelated to the particular project," including increases due to demand growth or fuel quality changes per MAR 1801(ll)(ii)(C).

Additionally, Part 18 of the Michigan Air Rules allows an existing utility steam generating unit to use a different baseline period for each pollutant under the definition of "Baseline Actual Emissions" in R336.2801(b)(i)(C) as follows:

> *"(C) For a regulated new source review pollutant, if a project involves multiple emissions units, then only 1 consecutive 24-month period shall be used to determine the baseline actual emissions for the emissions units being changed. A different consecutive 24-month period may be used for each regulated new source review pollutant." [Emphasis added]*

Accordingly, a pollutant-specific baseline for sulfur dioxide ("SO_2") was chosen as July 2006-June 2008. The pollutant-specific baseline for nitrogen oxides ("NO_X") was chosen to be October 2006-September 2008. The pollutant-specific baseline for particulate matter (PM) was chosen to be January 2008-December 2009.

All of the replacement components are identical or functionally equivalent to the equipment now in service, and they do not change the basic design parameters of Monroe Unit 2, which will continue to meet enforceable emission and operational limitations. Moreover, the Utility Air Regulatory Group (UARG), an organization of which DTE Energy is a member, has submitted to the EPA NSR Docket during prior comment periods a list of repair and replacement activities that utilities must perform to keep electric generating facilities operational.[1] These activities are considered routine in the electric utility industry. Furthermore, MAR 1801(aa)(iii)(A) specifies that routine maintenance, repair and replacement activities are not major modifications. Therefore, Part 18 requirements do not apply to these projects.

If you have questions on this notice, please contact me at (313) 235-4698 or via email at gossiauxk@dteenergy.com or you may contact Mr. Wayne Rugenstein at (313) 235-7023 or via email at ***rugensteinw@dteenergy.com***.

Regards,

Wayne A. Rugenstein for

Kelly L. Guertin
Staff Environmental Engineer
Environmental Management & Resources

Attachments

FILE: MONPP U2 Planned Outage 2010 - NSR Notification.docx

Cc: C. E. Jennings
R. C. Larlham
Scott Miller – AQD Jackson
F. D. Warren

[1] DTE has previously provided to your office a copy of the UARG document as part of the Monroe Unit 1 Planned Maintenance Outage Notification dated January 21, 2004.

ATTACHMENT A

Monroe Power Plant Unit 2 Outage Summary

The following activities will be performed during the outage scheduled to begin on or about March 13, 2010, and are exempt under the Michigan Air Pollution Rules as outlined below:

- **Boiler System Repairs and Replacements** – Replacement of economizer tubes; replacement of reheat pendants; replacement of a section of water wall tubes and burner cells; and boiler tube chemical cleaning with the replacement of 210 valves. These activities are exempt under MAR 285(a).
- **Turbine System Repairs and Replacements** – Rewind MTG rotor; install static exciter; replacement of generator lead box; overhaul of north boiler feed pump turbine & rebuild south boiler feed pump; and install boiler feed pump TSI. These activities are exempt under MAR 285(a).
- **Electrical System Repairs and Replacements** – Replace system service transformer #62; replace 4160V cables from system service transformers; rebuild 9-4160V circuit breakers. These activities are exempt under MAR 285(a).
- **Draft & Fuel Burning Repairs and Replacements** – Replace ten air heater gas side expansion joint. This activity is exempt under MAR 285(a).

Table 1
Monroe Power Plant - Unit 2
Comparison of Actual and Projected Actual Emissions & Operations

Period	Baseline Actual per MAR 1801(b)[1][2]	Pollutant - Specific Baseline Actual Emissions for NO_X per MAR 1801(b)[1][2]	Pollutant - Specific Baseline Actual Emissions for SO_2 per MAR 1801(b)[1][2]	Pollutant - Specific Baseline Actual Emissions for PM per MAR 1801(b)[1][2]	PROMOD Projection per MAR 1802(ll)(ll)(A)[3]	Emissions Excluded per MAR 1802(ll)(ll)(A)[3]	Projected Actual Emissions per MAR 1802(ll)(ll)	Emission Change
	May 2005-April 2007	October 2006-September 2008	July 2006-June 2008	January 2008-December 2009	January 2013-December 2013			
Unit Electrical Capacity, MW	795	795	795	795	795			
Net Generation, MWh	4,983,296				5,748,000			
Annual Capacity Factor	85.5%				82.5%			
Heat Input, mmBtu	47,335,146	44,343,031	45,802,027	43,742,775	54,974,000			
SO2, lb/mmBtu			1.32		1.23			
NOx, lb/mmBtu		0.47			0.53			
PM, lb/mmBtu				0.02	0.02			
SO2, tons			30,115		33,816	3,701	30,115	0
NOx, tons		10,398			14,494	4,096	10,398	0
PM, tons				498	615	117	498	0

Notes:

(1) Michigan Air Rule (MAR)

(2) Baseline values are a 12-month average of a selected 24-month consecutive operating period

(3) PROMOD projections are based on the maximum utilization for the period 2010-2014 as shown in the DTE Energy - Detroit Edison Power Supply Cost Recovery (PSCR) 2010 Annual Report (dated 9-10-09) as required by the Michigan Public Service Commission

FILE: Monroe 2 Notification Data - Table 1.xls
TAB: MONPP U2 NSR Notice 3-2010

EXHIBIT C TO DETROIT EDISON'S BRIEF IN SUPPORT OF MOTION TO STRIKE

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

Michael Solo, Esq.
DTE Energy
One Energy Plaza
Detroit, MI 48226-1279

MAY 28 2010

Re: *Monroe Unit 2 Capital Improvement Projects*

Dear Mr. Solo:

The United States Environmental Protection Agency ("EPA") has learned of information suggesting that DTE Energy ("DTE") is currently performing a number of capital improvement projects at unit 2 of the Monroe Power Plant. We have evidence indicating that these projects constitute modification(s) under the New Source Review ("NSR") provisions of the Clean Air Act, 42 U.S.C. § 7401, *et. seq.*, and the corresponding provisions of the Michigan State Implementation Plan ("SIP"). *See, e.g.*, Attachments A (March 12, 2010 K. Guertin Letter to W. Presson) ("Notice Letter") and B ("Extreme Makeover: Power Plant Edition," Monroe Evening News, April 22, 2010).

Please provide the information below by close of business on June 1, 2010.

As you know, it is illegal to modify an existing source of emissions without, *inter alia*, obtaining a permit and installing pollution controls. The seriousness of the violation would be compounded by beginning operation of the illegally modified unit. U.S. EPA is charged with enforcement of the Clean Air Act, *e.g.*, 42 U.S.C. § 7413, and has the authority to "take such measures, including issuance of an order, or seeking injunctive relief, as necessary to prevent the construction or modification of a major emitting facility which does not conform to the requirements of this part." 42 U.S.C. § 7477. EPA also has the authority to obtain information from owners and operations of emissions sources. 42 U.S.C. § 7414.

DTE has provided information to state regulators that it is currently performing capital projects, including the replacement of the economizer and the high temperature reheater pendant, at Monroe unit 2. The information provided indicates that the project will last until mid-June. In its Notice Letter, DTE projects emissions increases of 3,701 tons of SO_2, 4,096 tons of NO_X, and 615 tons of PM compared to the baseline periods selected by the company. DTE has provided no information that these emissions increases can be excluded as caused solely by demand

growth. Under the rules, for an applicant to exclude any portion of an emissions increase, it must demonstrate *both* (i) that those emissions "could have accommodated during the consecutive 24-month period used to establish the baseline actual emissions" *and* (ii) that those emissions are "unrelated to the particular project." MAR 1801(ll)(2)(C).

Given that DTE may soon complete its modification of Monroe Unit 2, time is of the essence. Pursuant to Section 114, please provide the following information by the close of business on **June 1, 2010**:

- When currently DTE expects to complete the outage at unit 2; and
- Any additional information that you believe supports your contention that the work done during this outage does *not* require a permit.

Sincerely,

Phillip A. Brooks
Director, Air Enforcement Division

EXHIBIT D TO DETROIT EDISON'S BRIEF IN SUPPORT OF MOTION TO STRIKE

DTE Energy Company
One Energy Plaza, Detroit, MI 48226-1279

DTE Energy

MICHAEL J. SOLO, JR.
Attorney
(313) 235-9512

June 1, 2010

Sabrina Argentieri
Associate Regional Counsel
U.S. Environmental Protection Agency—Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

Re: Request to Provide Information Pursuant to the Clean Air Act
Dated May 28, 2010

To Whom It May Concern:

Enclosed with this letter please find The Detroit Edison Company's ("Detroit Edison") response to the United States Environmental Protection Agency's ("EPA") Request to Provide Information Pursuant to the Clean Air Act ("Information Request"), dated May 28, 2010. The Information Request sent late on Friday afternoon prior to the Memorial Day Holiday weekend afforded Detroit Edison approximately one business day to provide its response. Due to this unreasonably short period of time for Detroit Edison to provide the requested information, and due to significant logistical issues in determining all of the potential additional information available to respond to the Information Request, Detroit Edison's reserves the right to amend or supplement this response.

Detroit Edison objects to the extent the Information Request is: (1) not related to whether Detroit Edison has been in compliance with applicable provisions of the federal Clean Air Act; (2) seeks information that is confidential and/or privileged; and/or (3) beyond the scope of EPA's legal authority. Further, by providing this response, Detroit Edison does not admit or acknowledge any noncompliance whatsoever with regard to the Clean Air Act, the Michigan State Implementation Plan or any other matter.

In the May 28, 2010 Information Request, EPA requested that Detroit Edison provide the date that it currently expects to complete the Monroe Power Plant's Unit 2 Outage. Detroit Edison expects that the current outage will be concluded on June, 9 2010. Detroit Edison also anticipates limited operation and testing of the unit prior to the conclusion of the outage.

EPA further requested information that Detroit Edison believes supports the contention that the work being performed does not require a permit. As set forth in DTE's March 12, 2010 planned outage notification letter to the permitting authority, the Michigan Department of Natural Resources and the Environment ("MDNRE"), this project does not require a permit because it is (1) routine maintenance, repair and replacement ("RMRR") under EPA's historic and Michigan's implementation of that term; and (2) the project would not result in a significant emissions increase.

With respect to RMRR, the project consists primarily of tube component replacements, similar to hundreds of such replacements in the industry and within DTE's system. As a matter of fact, Michigan Air Pollution Rule 285 (a) specifically exempts the tube and generator repair as examples of RMRR.

With respect to emissions increase, as discussed more fully below, Detroit Edison has thoroughly evaluated the project, as it has done for virtually every large outage over the last decade. Detroit Edison has carefully complied with the direction provided by the EPA on May 23, 2000 in response to the company's requested applicability determination on a project at the same plant at that time. We have consistently reported maintenance, repair and replacement projects to the MDNRE with baseline emissions and projected emissions, excluding "emission increases that are caused by other factors, for example, emission increases ... due to variability in control technology performance or coal characteristics," and, "that portion of its emissions attributable to increased use at the unit due to the growth in electrical demand for the utility system as a whole since the baseline period." MDNRE is intimately familiar with Detroit Edison's methodology for making these analyses, and it has never questioned any of Detroit Edison's submittals, including the one at issue here for the Monroe Unit 2 project. The applicable regulations call for a comparison of "projected actual emissions" and "baseline emissions" to determine whether a project would result in a significant emissions increase. To account for the statutory requirement of causation, the regulations require the Company to

> Exclude, in calculating any increase in emissions that results from the particular project, that portion of the unit's emissions following the project that an existing unit could have accommodated during the consecutive 24-month period used to establish the baseline actual emissions and that are also unrelated to the particular project, including any increased utilization due to product demand growth.

MAR 1801(ll)(ii)(C). In addition, the regulations require the Company to

> Consider all relevant information, including but not limited to, historical operational data, the company's own representations, the company's expected business activity and the company's highest projections of business activity, the company's filings with the state or federal regulatory authorities, and compliance plans under the state implementation plan.

MAR 1801(ll)(ii)(A).

One fact that was clear to the MDNRE but that EPA may not have been aware of is that Monroe Units 1 and 2 share a stack. As a result, in the past, emissions from the two units have been prorated based on electrical generation. Beginning in 2013, we are projecting emissions separately, as Unit 1 will exhaust to a separate stack because it will be outfitted with a flue gas desulfurization (FGD) system and a new stack. As a result, the baseline year is actually based on the average emission rate between a unit controlled with SCR and one that is not controlled.

Detroit Edison recognizes that the regulations require essentially two steps in determining the "projected actual emissions" for the unit. First, the Company must project emissions for five years after the project, based on the Company's general methodologies for estimating future utilization and emissions, and accounting for all relevant information as of the date of the projection. Second, the Company must exclude increased emissions that (1) are unrelated to the project and (2) could have been accommodated in the baseline period.

Accordingly, in evaluating this project, Detroit Edison first used its then current system-wide projection, which it had already filed with the Michigan Public Service Commission. That projection used PROMOD, a production cost model widely used in the industry for short to medium range projections. The model used to make these projections did *not* include any changes to the characteristics of the unit based on the project, because the project is not expected to affect the performance characteristics of the unit as compared to its characteristics before the project. Thus, while the model projected increases in the unit's utilization and emissions as compared to the baseline, those increases are completely unrelated to the project. They are due to (then) expected increased demand on the unit as a result of myriad factors, including most notably an increase in demand for the system as a whole and an extended outage for Monroe Unit 1 in 2013 for the purpose of tying new environmental controls for that unit (a scrubber).

It should be noted that at the time of the March notification, a primary driver for a projected increase in generation (and commensurate projected

increase in emissions) from the Monroe Power Plant was an expected increase in power demand accompanied by an increase in energy cost by $5.85/MWh. This increase in power demand, and increased costs of power, led to an increase in power demanded from Monroe Unit 2. This increase in power demand led to the following other factors affecting emissions:

- Monroe 2 has no periodic outage scheduled for 2013, while it had outages planned in 2010, 2012 and 2014, three of the other years that were evaluated as part of the letter. Significant work (tie-in of a new FGD) is planned for Monroe Unit 1 and Monroe Unit 2 must help make up the difference in electricity demand. The plant does not generally schedule outages on more than one unit per year and will not overlap outages.
- An increase in demand from all the units in Detroit Edison's portfolio. For example, Monroe units were expected to increase generation from a projected 15,398 MW-hrs in 2010 to 19,172 MW-hrs in 2014, as reported in the PSCR report last fall. The entire fossil generation portfolio was expected to increase generation from a projected 44,595 MW-hrs in 2010 to 48,617 MW-hrs in 2014.
- Monroe can accommodate and has historically accommodated a wide range in fuel blends and this fuel variability is allowed under our permit as well as referenced in our Monroe Applicability Determination. Beginning in 2013, all the Monroe units will be blending significantly less low sulfur western coal, about a 3% drop in weight from 2012.

Notably, the scenario reflected in the PROMOD projections reported in the March notification is not the case any longer, as the cost of natural gas has dropped significantly. But this information was not available when the PSCR forecast was submitted last fall. If current information were used, it is unlikely that we would have even projected increased demand (and emissions) for this unit.

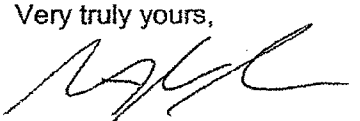
As noted earlier, an increase in utilization due to "demand growth" can be excluded from emissions increase estimates, as it was in Detroit Edison's analysis. Just as a note of interest, although the projections made in our March 12, 2010 notification were based on the latest official PROMOD run, it is now believed that emission projections will be less due to the continuing lower price of natural gas and the slower economic recovery of the area.

Detroit Edison also determined that the projected increases could have been accommodated in the baseline period. Specifically, the projected capacity factor for 2013 for Monroe Unit 2 is 82.5%. During the baseline period of May, 2005 through April, 2007, the equivalent availability factor of the unit was approximately 85.2%, and thus the unit could have accommodated the projected increase. As a result, Monroe Unit 2 could have generated the 5,478,000 MW-hrs

described in our letter, had the market required the electricity during our baseline period.

I trust that you will find this response to the Information Request satisfactory. If you have any questions regarding this submission, please contact the undersigned.

Very truly yours,



Michael J. Solo, Jr.

MJS/dmc
Enclosure
cc: William Presson , MDNRE
Mark Palermo, EPA Region 5
Ethan Chatfield, EPA Region 5
Skiles Boyd, Detroit Edison
William Brunell, Detroit Edison Counsel

EXHIBIT E TO DETROIT EDISON'S BRIEF IN SUPPORT OF MOTION TO STRIKE

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

Michael Solo, Esq.
DTE Energy
One Energy Plaza
Detroit, MI 48226-1279

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

Re: *Monroe Unit 2 Capital Improvement Projects*

Dear Mr. Solo:

Thank you for your letter of June 1, 2010 responding to our May 28, 2010 request for information under the Clean Air Act.

You refer to your PROMOD projections used in support of a filing with the Michigan Public Service Commission last fall. This was also the asserted basis for your projection in your March 12, 2010 notification letter to the state.

Please provide all availability and outage rates used as inputs for Monroe Unit 2 in the PROMOD analysis that was used in support of the Power Supply Cost Recovery 2010 Annual Report and that you reference in your June 1 and March 12 letters. Please also provide the generating unit summary reports for Monroe Unit 2 related to that PROMOD analysis.

In addition, your letter and the March 12, 2010 letter set forth contradictory information regarding the May 2005 to April 2007 baseline period. The March letter sets forth a capacity factor that is inconsistent with the heat input and generation figures in Table 1 and with information reported to EPA. Your letter yesterday states that what is listed in the March letter as a capacity factor is actually an equivalent availability factor. Please clarify these values.

Pursuant to Section 114 of the Clean Air Act, please provide this information as soon as possible and in any event by **10 a.m. Thursday, June 3.** If you have any questions, please contact Mark Palermo, EPA Region 5.

Sincerely,

Phillip A. Brooks
Director, Air Enforcement Division

EXHIBIT F TO DETROIT EDISON'S BRIEF IN SUPPORT OF MOTION TO STRIKE

DTE Energy Company
One Energy Plaza, Detroit, MI 48226-1279

DTE Energy

MICHAEL J. SOLO, JR.
Attorney
(313) 235-9512

June 3, 2010

Mark Palermo
Associate Regional Counsel
U.S. Environmental Protection Agency—Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

Re: Request to Provide Additional Information Pursuant to the Clean Air Act dated June 2, 2010

Dear Mr. Palermo:

Enclosed with this letter please find The Detroit Edison Company's ("Detroit Edison") response to the United States Environmental Protection Agency's ("EPA") June 2, 2010 request to provide additional information to Detroit Edison's response to the EPA's Clean Air Act Information Request, dated May 28, 2010.

The request for additional information provided Detroit Edison less than one business day to respond by demanding that the response be provided by 10:00 a.m. June 3, 2010. This request is on the heal of the initial request sent late on Friday afternoon prior to the Memorial Day Holiday weekend that afforded Detroit Edison approximately one business day to provide its response. Due to this unreasonably short period of time for Detroit Edison to provide the requested information, Detroit Edison's reserves the right to amend or supplement this response. Detroit Edison is perplexed by this action regarding an outage to maintain a unit, and which will not increase emissions. As explained previously, the model projected increase in emissions in 2013 which seems to be driving this action is a result of a projected (hoped for) increase in demand and an outage on a sister unit at the plant to tie in a flue gas desulfurization unit being installed to significantly reduce emissions. In addition, as we have explained, assumptions today would likely not project any emission increase, even 3 years from now.

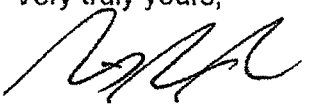
Detroit Edison objects to the extent the request is: (1) not related to whether Detroit Edison has been in compliance with applicable provisions of the federal Clean Air Act; (2) seeks information that is confidential and/or privileged; and/or (3) beyond the scope of EPA's legal authority. Further, by providing this response, Detroit Edison does not admit or acknowledge any noncompliance whatsoever with regard to the Clean Air Act, the Michigan State Implementation Plan or any other matter.

In the June 2, 2010 request for additional information, EPA requested Detroit Edison to provide all availability and outage rates used as inputs for Monroe Unit 2 in the PROMOD analysis that was used in support of the Power Supply Cost Recovery 2010 Annual Report referenced in Detroit Edison's June 1 and March 12 letters. Please see the attached document for the requested information.

In addition, EPA requested clarification regarding contradictory information from the May 2005 to April 2007 baseline period. The chart provided with Detroit Edison's March 12, 2010 notice to MDNRE included a typographical error. The error placed the units equivalent availability factor (EAF) in the field representing capacity factor. The capacity factor for Unit 2 between May, 2005 and April, 2007, was 72.2%, not the 85.5% included on the chart. The equivalent availability factor (EAF) for that period was 85.5%. The net generation and heat input figures contained in the table reflect the correct capacity factor of 72.2% for the baseline period.

I trust that you will find this response to the additional requested information satisfactory. If you have any questions regarding this submission, please contact the undersigned.

Very truly yours,



Michael J. Solo, Jr.

MJS/dmc
Enclosure
cc: William Presson , MDNRE
Ethan Chatfield, EPA Region 5
Skiles Boyd, Detroit Edison
William Brunell, Detroit Edison Counsel

PSCR 2010
MAINTENANCE SCHEDULE - PROMOD INPUT

Plant Name	Unit Number	Start Date	End Date
MnreMI	2	3/6/2010	5/26/2010
MnreMI	2	6/11/2010	6/15/2010
MnreMI	2	10/25/2012	11/21/2012
MnreMI	2	9/17/2013	9/24/2013
MnreMI	2	3/1/2014	5/7/2014
MnreMI	2	9/17/2014	9/24/2014

FILE: Monroe 2 - PROMOD input & output.xlsx
TAB: Maintenance Schedule - Input

PSCR 2010
PROMOD OUTPUT - MONROE 2 (only)

	2010	2011	2012	2013	2014
UNIT DATA					
NO2 Oil - Heat Consumed - (thousands of mmBTU	81	110	102	110	91
Coal Heat Consumed - (kMBTu)	40,600	54,724	50,984	54,864	45,305
Coal Consumed - Tons					
MSE	699	969	910	1,049	901
LSW	1,306	1,722	1,594	1,616	1,284
Total	2,005	2,691	2,504	2,664	2,185
Generation - GWh	4,217	5,700	5,322	5,748	4,739
Heat Rate - BTU/KWh	9,646	9,619	9,600	9,564	9,579
Average Loading - MW	698	709	718	735	750
Operating Hours - Hours	6,040	8,039	7,414	7,825	6,320
Equivalent Availability - %	69%	92%	84%	89%	72%
Loading Factor - %	88%	89%	90%	92%	96%
Periodic - %	24%	0%	8%	2%	21%
Random Outage Factor (ROF) - %	7%	8%	8%	8%	7%
Random Outage Factor (ROR) - %	9.5%	8.3%	8.7%	8.7%	8.9%
Capacity Factor - %	60.6%	81.9%	76.2%	82.5%	69.0%
Operating Capacity - MW's	703	712	720	736	754
EMISSION DATA - (stack weighted in 2010-2012, until Scrubber Installation)					
PM Tons	451	610	570	615	507
HG Tons	148,737	200,481	173,065	200,994	164,485
HG Rate lb/mbtu	7.312	7.312	6.775	7.312	7.247
SO2 Tons	23,811	32,512	30,403	33,816	6,956
SO2 Rate lb/mbtu	1.171	1.186	1.190	1.230	0.306
SO2 Dispatch Cost - ($/MWh)	$0.236	$0.244	$0.249	$0.260	$0.069
NOx Tons	5,226	8,345	7,395	14,494	11,857
NOx Rate - lb/mbtu	0.257	0.304	0.290	0.527	0.522
NOx Dispatch Cost - ($/MBTU)	$0.17	$0.11	$0.08	$0.08	$0.08
SO2 Dispatch Cost - ($/MWh)	$1.68	$1.02	$0.73	$0.80	$0.80
DISPATCH COST(S)					
Total Dispatch Cost - $/MBTU	$2.45	$3.10	$3.22	$3.30	$3.40
Total Dispatch Cost - $/MWh	$23.67	$29.82	$30.91	$31.61	$32.57
Fuel Dispatch Cost - $/MBTU (by fuel type)					
LSW	$1.56	$2.39	$2.56	$2.63	$2.76
MSE	$2.84	$3.37	$3.47	$3.50	$3.56
MN2 (No.2 oil)	$15.48	$16.66	$17.14	$16.86	$17.33
Fuel Dispatch Cost - $/MWh	$20.68	$27.48	$28.78	$29.40	$30.55
Variable O&M $/MBTu	$0.11	$0.11	$0.12	$0.12	$0.12
FUEL BLEND					
Fuel Blend by BTU (Coal) - %					
LSW	57%	55%	55%	52%	50%
MSE	43%	45%	45%	48%	50%
Fuel Blend by Weight (Coal) - %					
LSW	65%	64%	64%	61%	59%
MSE	35%	36%	36%	39%	41%

EXHIBIT G TO DETROIT EDISON'S BRIEF IN SUPPORT OF MOTION TO STRIKE

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF:	)	
	)	
	)	
DTE Energy Company	)	**Proceedings Pursuant to**
and	)	**Section 113(a)(1) and (a)(3) of the**
The Detroit Edison Company	)	**Clean Air Act,**
	)	**42 U.S.C. §7413(a)(1) and (a)(3)**
	)	
Detroit, Michigan	)	**EPA-HQ-2010-MI-1**
	)	
	)	

NOTICE AND FINDING OF VIOLATION

The U.S. Environmental Protection Agency (EPA) is issuing this Notice and Finding of Violation (Notice) under Section 113(a)(1) and 113(a)(3) of the Clean Air Act, 42 U.S.C. § 7413(a)(1) and § 7413(a)(3). The authority to issue this Notice has been delegated to the Director, Air Enforcement Division, Office of Enforcement and Compliance Assurance, U.S. EPA. EPA finds that DTE Energy and the Detroit Edison Company (collectively herein, DTE) are violating the Clean Air Act (Act), 42 U.S.C. §§ 7401 *et seq.*, at its Monroe power plant, as follows:

STATUTORY AND REGULATORY BACKGROUND

Prevention of Significant Deterioration

1. When the Act was passed in 1970, Congress exempted existing facilities, including the coal-fired power plants that are the subject of this Notice, from many of its requirements. However, Congress also made it quite clear that this exemption would not last forever. As the United States Court of Appeals for the D.C. Circuit explained in *Alabama Power v. Costle*, 636 F.2d 323, 400 (D.C. Cir. 1979), "[t]he statutory scheme intends to 'grandfather' existing industries; but...this is not to constitute a perpetual immunity from all standards under the PSD program." Rather, the Act requires grandfathered facilities to install modern pollution control devices whenever the unit is proposed to be modified in such a way that its emissions may increase.

2. On June 19, 1978, EPA promulgated regulations pursuant to Part C of Title I of the Act. 43 *Fed. Reg.* 26403 (June 19, 1978).

3. The Prevention of Significant Deterioration (PSD) provisions of Part C of Title I of the Act establish specific provisions applicable to the construction and modification of sources located in areas designated as either attainment or unclassifiable for purposes of meeting the NAAQS. *See* 42 U.S.C. §§ 7470-7492. These statutory provisions and their implementing regulations at 40 C.F.R.

§ 52.21, collectively known as the PSD program, provide that if a major stationary source located in an attainment area is planning to make a major modification, then that source must obtain a PSD permit before beginning actual construction. *See* 40 C.F.R. § 52.21(i). To obtain this permit, the source must, among other things, undergo a technology review and apply Best Available Control Technology (BACT); perform a source impact analysis; perform an air quality analysis and modeling; submit appropriate information; and conduct additional impact analyses as required.

4. On September 16, 2008, EPA conditionally approved the State of Michigan's PSD program under 40 C.F.R. § 52.21, 73 Fed. Reg. 53366. On March 25, 2010, EPA fully approved Michigan's PSD SIP provisions, 75 Fed. Reg. 14,352. The Michigan PSD SIP provisions are codified at Michigan Admin. Code R. 336.2801 to 336.2830.

5. The PSD regulations appearing at Michigan Admin. Code R. 336.2801 to 336.2830 were incorporated into and part of the Michigan SIP at the time of the major modification at issue in this case, and they have been approved by EPA and are federally enforceable requirements. All citations to the PSD regulations herein refer to the provisions of Michigan SIP as applicable at the time of the Current Construction Activities described herein.

6. Michigan Admin. Code R. 336.2802(3) provides that no new major stationary source or major modification to which R 336.2810 to R 336.2818 apply shall begin actual construction without a permit to install issued under R 336.1201(1)(a) that states that the major stationary source or major modification will meet those requirements.

7. Michigan Admin. Code R. 336.2802(4) provides that this part applies to the construction of new major sources and major modifications to existing major sources in the following manner: (a) . . . a project is a major modification for a regulated new source pollutant if it causes both of the following types of emission increases: (i) significant emissions increase and (ii) significant net emission increase.

Non-attainment New Source Review

8. Part D of Title I of the Act, 42 U.S.C. §§ 7501-7515, sets forth provisions for New Source Review ("NSR") requirements for areas designated as being in non-attainment with the NAAQS standards. These provisions are referred to herein as the "Non-attainment NSR" program. The Non-attainment NSR program is intended to reduce emissions of air pollutants in areas that have not attained NAAQS so that the areas make progress towards meeting the NAAQS. Prior to the effective date of the 1990 Clean Air Act Amendments, P. Law 101-549, effective November 15, 1990, the Non-attainment NSR provisions were set forth at 42 U.S.C. §§ 7501-7508.

9. Under Section 172(c)(5) of the Non-attainment NSR provisions of the Act, 42 U.S.C. § 7502(c)(5), each state is required to adopt Non-attainment NSR SIP rules that include provisions to require permits that conform to the requirements of Section 173 of the Act, 42 U.S.C. § 7503, for the construction and operation of modified major stationary sources within non-attainment areas. Section 173 of the Act, in turn, sets forth a series of minimum requirements for the issuance of permits for major modifications to major stationary sources

within non-attainment areas. 42 U.S.C. § 7503.

10. Section 173(a) of the Act, 42 U.S.C. 7503(a), provides that construction and operating permits may be issued if, *inter alia*: "(a) sufficient offsetting emission reductions have been obtained to reduce existing emissions to the point where reasonable further progress towards meeting the national ambient air quality standards is maintained; and (b) the pollution controls to be employed will reduce emissions to the lowest achievable emission rate."

11. Under 40 C.F.R. Part 51, Appendix S, Emission Offset Interpretative Ruling, no person may undertake a major modification of an existing major stationary source in a non-attainment area without first obtaining a Non-attainment NSR permit.

12. Under Appendix S, a "major stationary source" of NO_x is one that emits or has the potential to emit 100 tons per year or more, and a "significant" net emissions increase of NO_x is one that results in increased emissions of 40 tons per year or more of this pollutant.

13. "Major modification" is defined by 40 C.F.R. Part 51, Appendix S, as "any physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the Act."

FACTUAL BACKGROUND

14. DTE is a "person," as that term is defined in Section 302(e) of the Act, 42 U.S.C. § 7602(e).

15. From April 5, 2005, to the present, the Monroe power plant has been located in an area classified as non-attainment for fine particulates ($PM_{2.5}$).

16. At all times relevant to the NOV, the Monroe power plant has been located in an area that has been classified as attainment for SO_2 and ozone.

17. The Monroe power plant is a fossil fuel-fired electric utility steam generating station located in Monroe County, Michigan, and has the potential to emit more than 100 tons per year each of NO_x, SO_2, and particulate matter (PM). The plant consists of four cell burner boilers originally constructed in the early 1970s. Each boiler is connected to a turbine generator with a capacity of 750 to 795 megawatts (MWs).

18. The Monroe power plant is a fossil fuel-fired steam electric plant of more than 250 million British thermal units per hour and is therefore a "major stationary source" within the meaning of 40 C.F.R. § 52.21(b)(1)(i)(a); and a "major emitting facility" within the meaning of Section 169(1) of the Act, 42 U.S.C. § 7479(1). *See also* Michigan Admin. Code R. 336.2801(cc).

19. On March 12, 2010, DTE sent a "Planned Outage Notification" letter ("Notification Letter") to the Michigan Department of Environmental Quality (now known as the MDNRE). The Notification Letter stated that DTE was going to begin a 12-week outage at

Monroe Unit 2 on or about March 13, 2010 and described the activities that would take place during the outage.

20. The construction activities that DTE commenced on or about March 13, 2010, include, but are not limited to the following work on the unit's boiler: replacement of economizer tubes; replacement of reheat pendants; and replacement of a section of waterwall tubes and burner cells.

21. EPA has calculated that the replacement projects identified in Paragrpah 20 are major modifications under the Clean Air Act and the Michigan implementing regulations, as they will result in projected emissions increases in excess of 40 TPY of NO_x and SO_2.

VIOLATIONS

Prevention of Significant Deterioration and Non-Attainment New Source Review

22. The physical change identified in the Paragraph 20, above, resulted in a significant net emissions increase, as defined at Michigan Admin. Code R. 336.2801 to 336.2830 and 40 C.F.R. Part 51, Appendix S, of SO_2, NO_x, $PM_{2.5}$, ozone and/or PM.

23. The physical change identified in Paragraph 20, above, constitutes a "major modification," as that term is defined at Michigan Admin. Code R. 336.2801 to 336.2830 and 40 C.F.R. Part 51, Appendix S.

24. For the physical change identified in Paragraph 20, above, DTE failed to obtain a PSD and/or non-attainment NSR permit as required by Michigan Admin. Code R. 336.2801 to 336.2830 and 40 C.F.R. Part 51, Appendix S.

25. DTE is in violation of PSD requirements, Section 165 of the Act, 42 U.S.C. § 7475, and Michigan Admin. Code R. 336.2801 to 336.2830 for constructing a major modification, as identified in Paragraph 20, above, to an existing major source at its Monroe power plant without applying for or obtaining a PSD permit, and operating the modified unit without installing BACT or going through PSD review, and installing appropriate emission control equipment in accordance with a BACT analysis.

26. DTE is in violation of non-attainment NSR requirements, Sections 171-193 of the Act, 42 U.S.C. §§ 7501-7515, and 40 C.F.R. Part 51, Appendix S, Emission Offset Interpretative Ruling, for constructing a major modification, as identified in Paragraph 20, above, to an existing major source at its Monroe power plant without applying for a permit, and operating the modified unit without installing LAER, obtaining Federally enforceable emission offsets at least as great as the new or modified source's emissions, certifying that all other major sources that it owns or operates are in compliance with the Act, and demonstrating that the benefits of the proposed source or modification significantly outweigh the environmental and social costs imposed as a result of its construction or modification.

ENFORCEMENT AUTHORITY

27. Section 113(a)(1) of the Act, 42 U.S.C. § 7413(a)(1), provides that at any time after the expiration of 30 days following the date of the issuance of a Notice of Violation, the Administrator may, without regard to the period of violation, issue an order requiring compliance with the requirements of the state implementation plan or permit, issue an administrative penalty order pursuant to Section 113(d), or bring a civil action pursuant to Section 113(b) for injunctive relief and/or civil penalties.

28. Section 113(a)(3) of the Act, 42 U.S.C. § 7413(a)(3), provides in part that if the Administrator finds that a person has violated, or is in violation of any requirement or prohibition of any rule...promulgated...under...[Title I of the Act], the Administrator may issue an administrative penalty order under Section 113(d), issue an order requiring compliance with such requirement or prohibition, or bring a civil action pursuant to Section 113(b) for injunctive relief and/or civil penalties.

29. Section 113(b) of the Act, 42 U.S.C. § 7413(b), authorizes the Administrator to initiate a judicial enforcement action for a permanent or temporary injunction, and/or for a civil penalty of up to $25,000 per day for each violation occurring on or before January 30, 1997; up to $27,500 per day for each such violation occurring on or after January 31, 1997, and up to and including March 15, 2004; up to $32,500 per day for each such violation occurring on or after March 16, 2004 through January 12, 2009; and up to $37,500 per day for each such violation occurring on or after January 13, 2009, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by 31 U.S.C. § 3701, 40 C.F.R. § 19.4, and 74 Fed. Reg. 626 (Jan. 7, 2009), against any person whenever such person has violated, or is in violation of, *inter alia*, the requirements or prohibitions described in the preceding paragraphs.

Dated 6/4/10

Phillip A. Brooks
Director
Air Enforcement Division

CERTIFICATE OF MAILING

I, Ilana Saltzbart, certify that I sent a Notice of Violation and Finding of Violation, EPA-HQ-2010-MI-1, by Certified Mail, Return Receipt Requested, to:

Skiles W. Boyd, Director of Environmental Management
Detroit Edison Company
2000 Second Ave.
Detroit, MI 48226-1279

I also certify that I sent copies of the Notice of Violation and Finding of Violation by Certified Mail, Return Receipt Requested, to:

Michael Solo, Esq.
DTE Energy
One Energy Plaza
Detroit, MI 48226-1279

Thomas Hess, Unit Supervisor
Compliance and Enforcement Section
Michigan Department of Natural Resources and Environment
Air Quality Division
P.O. Box 30260
Lansing, Michigan 48909

Teresa Seidel, District Supervisor
Michigan Department of Natural Resources and Environment
Southeast Michigan District Office
27700 Donald Court
Warren, Michigan 48092-2793

Jack Larsen, District Supervisor
Michigan Department of Natural Resources and Environment
State Office Building, 4th Floor
301 E. Louis B. Glick Highway
Jackson, Michigan 49201

On the 4th day of June, 2010

CERTIFIED MAIL RECEIPT NUMBER: 7008 2810 0001 0214 1544

EXHIBIT H TO DETROIT EDISON'S BRIEF IN SUPPORT OF MOTION TO STRIKE

----- Original Message -----
From: Palermo.Mark@epamail.epa.gov <Palermo.Mark@epamail.epa.gov>
To: solom@dteenergy.com <solom@dteenergy.com>
Cc: Brownell, Bill; Chapman.Apple@epamail.epa.gov <Chapman.Apple@epamail.epa.gov>; TBenson@enrd.usdoj.gov <TBenson@enrd.usdoj.gov>; Palermo.Mark@epamail.epa.gov <Palermo.Mark@epamail.epa.gov>
Sent: Tue Jun 08 12:40:53 2010
Subject: Fw: URGENT: Notice of Violation/Finding of Violation and Request for Information

Mike:

1. Regarding your question on the 6/6/10 Information Request regarding whether we have a licensed user for the PROMOD software, we do have consultants who are licensed users.

2. Regarding the 6/4/10 NOV, we note that we inadvertently left off our notice of opportunity to DTE to have a Section 113 conference to discuss the NOV. Please let me know by Friday June 11, 2010 if DTE is interested in having such a conference.

3. Regarding your 6/7/10 request for extension on the deadline for certain questions in the May 24, 2010 request for information, we are reviewing the request now and will get back to you ASAP.

4. During last week's inspection, our inspectors were informed that Monroe Unit 2 would be providing electricity to the grid as soon as Sunday June 6, 2010. Please let me know if that has occurred, or if not, what is the current status of the Monroe Unit 2 unit and whether DTE is planning to put Unit 2 back on-line and if so, what the expected date Monroe Unit 2 would be back on-line and providing electricity to the grid.

Thank you,

Mark

Mark J. Palermo
Associate Regional Counsel
U.S. EPA Region 5
(312) 886-6082

----- Forwarded by Mark Palermo/R5/USEPA/US on 06/08/2010 11:28 AM -----

From: Ilana Saltzbart/DC/USEPA/US

To: solom@dteenergy.com

Cc: bbrownell@hunton.com, TBenson@ENRD.USDOJ.GOV, Apple Chapman/DC/USEPA/US@EPA, Mark Palermo/R5/USEPA/US@EPA, Sabrina Argentieri/R5/USEPA/US@EPA

Date: 06/04/2010 06:59 PM

Subject: URGENT: Notice of Violation/Finding of Violation and Request for Information

Mike: Please see the attached Notice and Finding of Violation and Request for Information. Please direct any questions to Mark Palermo, EPA Region 5.

(See attached file: DTE_NOV_6_4_2010.pdf) (See attached file: DTE_114_6_4_2010.pdf)

Thank you,

Ilana Saltzbart
Attorney-Advisor, US EPA, OECA, OCE
1200 Pennsylvania Avenue, NW, MC 2242A, Washington, DC 20460
Phone: 202 564 9935
Fax: 202 564 0035

EXHIBIT I TO DETROIT EDISON'S BRIEF IN SUPPORT OF MOTION TO STRIKE

No. 05-848

In the
Supreme Court of the United States

ENVIRONMENTAL DEFENSE, ET AL.,
Petitioners,

v.

DUKE ENERGY CORPORATION, ET AL.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

BRIEF OF THE STATES OF ALABAMA, ALASKA, COLORADO, INDIANA, KANSAS, NEBRASKA, SOUTH CAROLINA, SOUTH DAKOTA, VIRGINIA, AND WYOMING, AND THE STATE OF WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION, AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

Olivia Rowell
General Counsel

ALABAMA DEPARTMENT OF
ENVIRONMENTAL MANAGEMENT
1400 Coliseum Blvd.
Montgomery, Alabama 36110
(334) 271-7858

Troy King
Attorney General

Kevin C. Newsom
Solicitor General
Counsel of Record*

Robert D. Tambling
Chief, Environmental Division

STATE OF ALABAMA
Office of the Attorney General
11 South Union Street
Montgomery, Alabama 36130
(334) 242-7401

September 15, 2006

(Additional counsel for amici curiae are listed inside the front cover.)

* * *

It is worth pausing briefly to take stock of the story that EPA's present enforcement initiative - and the newfound view of the NSR/PSD rules that underlies it - requires the Court to believe. The current batch of enforcement actions alleges rampant, if not near-universal, non-compliance with NSR/PSD rules stretching back some 20 years. How, on EPA's retelling, did we get to this point? *First*, we must assume that nearly every major utility-industry player (and, more particularly, every major player's lawyers) either fundamentally misunderstood or blatantly ignored EPA guidance on the meaning of the term "major modification." *Second*, and worse, we must assume that the state environmental agencies that reviewed and approved the hundreds of building projects now under challenge (ADEM in Alabama Power's case, the North Carolina Department of Environment and Natural Resources in Duke's) likewise either misunderstood or ignored EPA guidance. *Finally*, and most bizarrely, we must assume that the EPA regulators themselves, whose very business it was to look over the States' shoulders, were (at best) asleep at the wheel. EPA's story here is either an elaborate conspiracy theory or a monument to bureaucratic incompetence. Occam's Razor suggests a different explanation: EPA's current litigating position just wasn't the prevailing understanding of NSR/PSD applicability during the two decades that preceded the current enforcement initiative's launch in 1999.

II. EPA's Litigating Position Undermines the Clean Air Act's Carefully Calibrated State-Federal Enforcement Scheme.

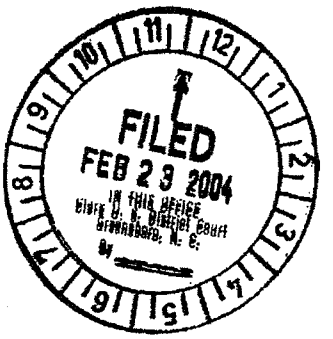
Congress enacted the Clean Air Act with federalism firmly in mind. There are two important federalism-related points worth making here, neither of which the state amici supporting petitioners seem to have come to grips with. First, whereas the Act makes States primarily responsible for regulating air pollution, and carves out NSR/PSD as a narrow exception to that general rule of state control, the

EXHIBIT J TO DETROIT EDISON'S BRIEF IN SUPPORT OF MOTION TO STRIKE

294.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA, Plaintiff and Counter-Defendant, and ENVIRONMENTAL DEFENSE; NORTH CAROLINA SIERRA CLUB; and NORTH CAROLINA PUBLIC INTEREST RESEARCH GROUP CITIZEN LOBBY/EDUCATION FUND, Intervenor-Plaintiffs, v. DUKE ENERGY CORPORATION, Defendant and Counter-Claimant.	CIVIL NO. 1:00CV01262



ORDER

BULLOCK, District Judge

On December 23, 2003, Plaintiff moved for reconsideration of the court's August 26, 2003, summary judgment order, or, in the alternative, to certify the order for interlocutory appeal. Plaintiff contends that the order should be reconsidered in light of documents recently made available to the Plaintiff that the Defendant received from counsel for the Utility Air Regulatory Group, a non-profit association of electric utility companies and trade associations of which Defendant is a member. Plaintiff

contends that these documents show that Defendant knew, or should have known, that EPA's test for "routine maintenance" focused on routine maintenance at an individual unit in the relevant industry. Plaintiff also contends that Duke also knew that the agency contended PSD was triggered by increases in total annual emissions notwithstanding the absence of an increase in maximum hourly emission rates.

Defendant contends that reconsideration is not warranted because Plaintiff's "newly discovered evidence" is not relevant to the issues decided by the court, is cumulative to evidence that the court has already seen, and is not inconsistent with the court's order. Defendant also opposes certification for interlocutory appeal.

In drafting its opinion and order, the court undertook a painstaking review of the statutory and regulatory framework. Relying on the statutes and legislative intent, the court held that "[i]n order to give PSD RMRR exemption its proper scope, this provision must be defined according to what is routine maintenance, repair, and replacement within the relevant source category. This construction is compelled by the statutory mandate of the PSD program and congressional intent." United States v. Duke Energy Corp., 278 F. Supp. 2d 619, 631 (M.D.N.C. 2003). The court also found "based on the PSD rules, the contemporaneous interpretations of the PSD rules, and the

statutory language incorporating the NSPS concept of modification into PSD, post-project emissions must be calculated on an annual basis, measuring emissions in tons per year, and in calculating post-project emissions levels, the hours and conditions of operation must be held constant." Id. at 640. Thus, even assuming that the EPA may have spoken out of both sides of its mouth on these issues, the primary basis for the court's holding was the plain statutory language and congressional intent. The question of fair notice, the basis for the Plaintiff's relevance argument, is no longer an issue for trial.

In the alternative, Plaintiff asks the court to certify its order for an immediate appeal pursuant to 28 U.S.C. § 1292(b). The statute requires that certification be based upon the district judge's "opinion that such order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." All three requirements must be satisfied. Although not in the statutory language, courts have held that to warrant an interlocutory appeal the appellant must demonstrate "'that exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment.'" Coopers & Lybrand v. Livesay, 437 U.S. 463, 475 (1978) (quoting Fisons, Ltd. v. United States, 458 F.2d 1241

1248 (7th Cir. 1972)). Because certification should not be granted routinely, procedural requirements for interlocutory appeal should be strictly construed. See Myles v. Laffitte, 881 F. 2d 125, 127 (4th Cir. 1989).

This case began in December 2000. Extensive discovery has been completed, dispositive motions have been ruled upon, and the case is essentially ready for trial. An interlocutory appeal would delay rather than advance the ultimate termination of this case. Further, it does not appear that a trial would be unusually lengthy. Plaintiff has conceded that the court's ruling that PSD is triggered only by projects that increase the unit's maximum hourly emissions rate will likely be determinative "of most if not all of the PSD claims in this case." Plaintiff has also admitted that it does not contend that projects of the type performed by Duke are unprecedented or even uncommon in the utility industry. While these standards are ones on which reasonable minds might disagree, this alone does not warrant interlocutory appeal. All three requirements of the statute must be viewed together. Regardless of whether Plaintiff has raised a controlling question of law as to which there is substantial ground for differences of opinion, the court does not believe the possibility that the court of appeals would entertain an interlocutory appeal of the court's summary judgment order would materially advance the termination of this litigation.

NOW, THEREFORE, the Plaintiff's motions for reconsideration of the court's summary judgment order, and, alternatively, to certify its order for interlocutory appeal [Doc. #268], are **DENIED.**

The court will direct the Clerk to schedule this case for trial during the July term and provide proper notice to the parties.

United States District Judge

February 23, 2004

EXHIBIT K TO DETROIT EDISON'S BRIEF IN SUPPORT OF MOTION TO STRIKE

TRANSCRIPTION OF:
THE AMERICAN BAR ASSOCIATION
UPDATE CLEAN AIR ACT 2000
PART 2

TRANSCRIBED BY:
ANGIE COKER
FOSHEE & TURNER

APPEARANCES

AS MEDIATOR:
ANDREA BEAR FIELD
Hunton & Williams
Washington, D.C.

PANEL:
KAREN BLANCHARD
Group Leader, New Source Review
Permitting Information Transfer and
Program Integration Division
Research Triangle Park, North Carolina

ROBERT L. BRUBAKER
Porter, Wright, Morris & Arther, LLP
Columbus, Ohio

BILL O'SULLIVAN
New Jersey Department of Environmental
Protection, Air Quality Permitting
Program
Trenton, New Jersey
BRUCE BUCKHEIT
Air Enforcement Division

Office of Regulatory Enforcement
Office of Enforcement and Compliance
Assurance, U.S. EPA
Washington, D.C.

MS. BEAR FIELD: Welcome back. We have one more panel today, and it's going to be not only the last panel I am doing today, but this is my swan song. I hope only that I can keep my voice going as long as this panel will take.

I don't expect to do a lot of talking today on New Source Review and enforcement issues because we have a very frisky panel including Karen Blanchard who is sitting in for Bill Harnet, who is not well today. Karen is the group leader for New Source Review in the Information Transfer and Program Integration Division of the OAQPS in Research Triangle Park, North Carolina.

We also have Bruce Buckheit, Director of Air Enforcement Division in the Office of Regulatory Enforcement in U.S. EPA in Washington D.C. We have Rob Brubaker who is a partner in the law firm of Porter, Wright, Morris and Arther in Columbus, Ohio. And Bill O'Sullivan who is Administrator of

the Air Quality Regulation Program and the Air Quality Permitting -- excuse me in the New Jersey Department of Environmental Protection in Trenton, New Jersey.

We are going to start today by talking about the New Source Review Program on the regulatory side, and we will continue to be shifting over to the enforcement side, but I expect there is going to be a lot of back and forth.

To start with Karen, Bob Perciasepe earlier today talking about the New Source Review Program as being a "highway," and that there is a regulatory program that is being developed now to provide "off-ramps" from the "highway." But maybe we could start with you providing us with a description of the highway. What is the New Source Review, NSR program?

MS. BLANCHARD: Okay. Well, the New Source Review Program is an preconstruction permitting program. The purpose of it is to cover or prevent --

Are you only going to target the old Eastern sources?"

MR. BUCKHEIT: It started in the East perhaps by coincidence, perhaps ease of management. Region 8 has recently opened a number of investigations, and I know Region 9 is looking at getting into this business as well. A number of states have recently asked for our help. They want to do their own investigations of their own instate sources.

I know New York State has joined our suits against upwind power plants, but New York is also investigating plants within its borders. Pennsylvania has advised us they would like to do the same thing. Florida and Texas are similarly situated. And so this kind of activity is --

MS. BEAR FIELD: We are talking a nationwide initiative? It's not just targeted in the Southeast and Midwest?

MR. BRUBAKER: I would like to comment briefly, Andrea, if I could, on the

picture that's painted here with respect to electric utilities. I see a picture that's not traditional enforcement. It's nothing I've experienced in 28 years of practice under the Clean Air Act. It's by far the largest initiative by any major measure that EPA has undertaken under the Clean Air Act.

I would just like to ask the audience to consider what's wrong with this picture. We have an industry that's, by its nature, very risk-averse and an industry that by its nature is very open and public and in a fish bowl with respect to every investment decision, every expenditure made by the industry. We have the industry that had the first New Source Performance Standard ever promulgated under the Clean Air Act, and that is probably the most heavily inspected and supervised and written about by EPA.

We have an industry that is the only industry that has an entire chapter of the Clean Air Act just to itself, the Acid Rain

Title that has required aggressive emission reductions particularly from the coal fire generators. We have an industry that is subject to state law obligations to serve the demand for electric power in a reliable, efficient, and cost-effective way.

And in the face of all of that, we have now complaints that come at the same time to 12 companies in 12 states going back 22 years, 23 years and even the Tennessee Valley Authority, an agency of the United States, that all of these companies that EPA has just recognized as having 100 percent compliance with the Acid Rain Program, having universal noncompliance with the New Source Review Modification Rule.

If you look at all the complaints and the notice of violations, what's striking about them is the commonality of the kinds of projects that are all tube placement, the same sorts of burners, tubes, component parts of power plants, that they are all doing the same thing. And I just

have to ask what's wrong with this picture? This is not traditional enforcement as I've ever known it under the Clean Air Act.

MR. BUCKHEIT: Perhaps this is reinvented enforcement, but let me explain why.

MS. BEAR FIELD: As we go along --

MR. BUCKHEIT: Let me explain why we are going about this differently. In the wood products cases, we did our test case, if you will. We pursued Louisiana Pacific first for its violations and achieved a settlement with them with quite significant fines and injunctive relief. It was $11 million fines if I recall and $70 million package for injunctive relief. And we thought that that would do it, that once that particular industry was put on notice of our views of the law -- and again this is not a modification. This is a Greenfield source, very straightforward issues -- that we would not have to invest further

resources in enforcement.

What we found was that the sources did not go universally. One company did, but the other companies did not go to their states and get the situation resolved, apply for permits, and obviate the need for enforcement action. Instead, they chose not to spend the very substantial sums of money that would be required to put on the pollution controls and wait for us. So we had to march through the next decade through the industry to address the problem.

The classic deterrents that we are taught to think of as enforcers just didn't seem to work. And the second factor, last year, we did a -- maybe two years ago now -- we did a major enforcement action against the manufacturers of diesel engines, and we found in settling those cases -- and they did settle, and again, it was almost a billion dollars of work and very large fines. But what made it easier to settle those cases were the facts that we were

doing them all at the same time.

The competitiveness issues associated with having to clean up first were eased if we were approaching the industry as a whole. And so we are doing it differently with the utility sector. We are trying to approach the entire sector where there are common issues, such as replacement of large capital parts at the end of their useful lives, to see if we can't get an industry-wide resolution of this.

MS. BEAR FIELD: I think, Bruce, the question or the issue that Rob raised is one that came in two separate questions, one from Atlanta and one from Anondale. It has to do with the routine repair, maintenance, replacement exclusion of the New Source Review rules where you repair a piece of equipment, you replace a piece of equipment that isn't functioning as well as it was. You refurbish equipment. And this was all done out in the open. You described the wood products industry as stuff that was

done kind of quietly and waiting for you to come along.

MR. BRUBAKER: We all agree here that routine maintenance repair and replacement is totally excluded from New Source Review. That's not controversial. The question is: What is the issue?

MS. BEAR FIELD: The question from Atlanta, Georgia we have: "EPA is taking the position that refurbishment and maintenance projects at facilities have been violating regulations for the past 30 years. These are projects that have not gone on secretly, and in many cases, minor New Source Review permits have been issued for the projects. One would expect that EPA would have known about these projects and that they are now alleging that these are the actions taken here are violations. Are these really violations, or is EPA simply rewriting their rules?"

MR. BUCKHEIT: The answer is yeah. We think they are violations. The

construction of the entire new factories and putting announcements in newspapers to hire workers at these factories that occurred in wood products cases, those were obviously out in the open. You could see them happening.

MS. BEAR FIELD: Don't go back to wood products. Stay with the it, Bruce.

MR. BRUBAKER: To address that level of factual information too, Bruce, with people that are not involved in those cases --

MR. BUCKHEIT: I am going to move on to utilities and say that the fact of a modification was certainly known to the PUCs, and that is indeed part of our argument. And that under standard industry regulation, routine maintenance is to be taken out of the base rate, maintaining the existing facility. For most of these projects that we are talking about, they were not taken out of the maintenance account. They were not treated as routine

by the companies. Most times, they went to the rate-making committees, you know, the PUCs and asked for increases in rates because this was an extraordinary event.

MR. BRUBAKER: The accounting method that's used to finance a project determines whether it is a modification that needs a PSD permit or not is not to be found in any statute, regulation, court decision, or guidance.

MR. BUCKHEIT: If I can finish my answer --

MR. BRUBAKER: It doesn't have anything to do with the real world. The same kind of projects are financed different ways by the same company and sometimes at the same unit.

MR. BUCKHEIT: If I can finish this, what we have done is we didn't -- I asked myself, do we need to do a test case in this area? And I found -- we found we didn't because we believe these issues were decided by the Court of Appeals for the 7th

Circuit cut back in 1990 in the WEPCO case, which I know you are familiar with.

MS. BEAR FIELD: So you are not going to go after anyone for anything before WEPCO, anything pre-1990?

MR. BRUBAKER: The agency had always held its view of routine maintenance, and we can start with Webster's. Webster's design defines "routine" as something -- the dictionary defines "routine" as something that's a commonplace or repetitious nature. And I think on a common sense level, we can all think about and we've all tried out different analogies --

MS. BEAR FIELD: Give us an analogy.

MR. BUCKHEIT: We can start with the car analogy, the house analogy, or dare I say it, the operating room analogy.

MS. BLANCHARD: I like the car analogy.

MS. BEAR FIELD: Let's go with the car analogy.

MR. BUCKHEIT: Okay. The car analogy is routine maintenance to change the filters. It's routine maintenance to change the tires, perhaps. I think most folks would understand that if you got into a wreck and had them do $15,000 worth of work or for instance, if you just bought a new engine, which is something you might consider doing once in the life of the car, that that's not routine.

MR. BRUBAKER: Who gets to decide the filters and the tires are routine, Bruce?

MR. BUCKHEIT: The courts will, if you will.

MR. BRUBAKER: So you don't know what's routine until you go to the courts and get a decision from the courts?

MR. BUCKHEIT: If you prefer our advice, we'll give it to you. But at the end of the day, this is not a voluntary program where the companies get to decide what the law is. Courts decide what the law

is. We had a case, the WEPCO case, where a company felt that very large modifications to the facility to bring them back to their original capacity, they had the argument that I think you asked earlier, that you are somehow entitled to your initial capacity of Day 1. That's all this company was seeking to do.

They argued that that was routine maintenance. They argued that the test was an hourly rate after emissions, not an annual, and they lost those issues.

MR. BRUBAKER: We should point out we are referring to WEPCO. W-E-P-C-O. That is an acronym for Wisconsin Electric Power Company. I will say that the case in 1988 is where the New Source Review Program got offtrack, and EPA got in the business of redefining, reinventing, revising what supposedly had been the rules all along, That increases in utilization were modifications. The Court did not agree with that, did not allow EPA to find increased

emissions relevant to the PSD modification rule based on increased utilization of the unit.

The Court did find that the Wisconsin Electric Power Company had increased its maximum hourly emission rate and had increased its maximum production capability. And the facts in the WEPCO case were quite extreme. One of the four units was 54 years old. The work done on the WEPCO units was unprecedented in the industry. It was replacement of 60-foot rear steam drums at a cost in today's dollars of -- on the order of a hundred million dollars. That was like $250 per kilowatt of investment, and these repairs at five units would be done in nine-month outages. So the unit is shut down for nine months while this work is done. That is a very different pattern.

MS. BEAR FIELD: It seems like we have the WEPCO situation as you've just described it being on one end. We have the

replacing of oil filters and tires on the other end. We've got this other area in the middle. If I do the maintenance every week, that's routine. If I do it every month -- I go in and clean something out, is that routine, once a year?

MR. BUCKHEIT: I see where you are heading, and I agree. I think we can all agree that when you get into question of what's routine, you can find a substantial gray area.

MS. BEAR FIELD: And I think one thing I would like to get back to the enforcement initiatives you talked about the timber, the wood products industry and the concern that they were building new facilities without going through permitting.

I am not familiar with the facts, so I am not going to debate whether that's true or not. With utilities, is the enforcement initiative largely about routine maintenance repair? Is that what it comes down to? Is that the big issue in the utility industry?

EXHIBIT L TO DETROIT EDISON'S BRIEF IN SUPPORT OF MOTION TO STRIKE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA, Plaintiff, ENVIRONMENTAL DEFENSE, NORTH CAROLINA SIERRA CLUB, NORTH CAROLINA PUBLIC INTEREST RESEARCH GROUP, Plaintiff-Intervenors v. DUKE ENERGY CORPORATION, Defendant.	Civil Action No. 1:00 CV 1262

UNITED STATES' RESPONSE TO DEFENDANT'S FIRST REQUEST FOR ADMISSIONS

Pursuant to Federal Rule of Civil Procedure 36, Plaintiff United States hereby responds to Defendant Duke Energy Corporation's ("Defendant") First Request for Admissions. The United States' response to each request for admission is based upon information and documents currently known to it and in its possession. The United States reserves the right to supplement its responses pursuant to Fed.R.Civ.P. 26(e).

OBJECTIONS

1. The United States objects to Defendant's First Request for Admissions to the extent it calls for production of information that is protected by any privilege, immunity, doctrine or other protection from discovery including, without limitation, the attorney-client privilege, the work product doctrine, and the deliberative process privilege.

2. The United States objects to Defendant's First Request for Admissions to the extent that they impose obligations or burdens beyond those imposed or allowed by the Federal Rules of Civil Procedure.

3. The United States objects to Defendant's First Request for Admissions to the extent that they are being employed as a discovery device. See Charles A. Wright & Arthur R. Miller, Federal

unit during a single outage is routine maintenance, repair or replacement.

RESPONSE: The United States objects to this Request because it calls for speculation on a hypothetical set of undefined and unknown facts. USEPA does not have a bright-line rule regarding whether a project will fall into the "routine maintenance" exemption from the Prevention of Significant Deterioration (PSD) permitting and pollution control requirements. Rather, USEPA makes a case-by-case determination of each project, considering its nature, purpose, duration, frequency and cost ("WEPCo factors"). As the number of components that need to be replaced increases, the WEPCo factors are more likely to indicate that the project is non-routine. Such a determination requires that the facility's owner or operator submit the project for review before undertaking the project. The United States has made reasonable inquiry and the information known or readily available to the United States at this time is insufficient to enable it to admit or deny this Request.

Request for Admission 130: Admit that the replacement of 100 leaky tubes at an electric utility unit during a single outage is routine maintenance, repair or replacement.

RESPONSE: The United States objects to this Request because it calls for speculation on a hypothetical set of undefined and unknown facts. USEPA does not have a bright-line rule regarding whether a project will fall into the "routine maintenance" exemption from the Prevention of Significant Deterioration (PSD) permitting and pollution control requirements. Rather, USEPA makes a case-by-case determination of each project, considering its nature, purpose, duration, frequency and cost ("WEPCo factors"). As the number of components that need to be replaced increases, the WEPCo factors are more likely to indicate that the project is non-routine. Such a determination requires that the facility's owner or operator submit the project for review before undertaking the project. The United States has made reasonable inquiry and the information known or readily available to the United States at this time is insufficient to enable it to admit or deny this Request.

Request for Admission 131: Admit that replacement of sections of waterwall tubes on coal-fired utility units is common in the electric utility industry.

RESPONSE: The United States Objects to this Request because it is vague and ambiguous. The term "common" is not defined in Defendant's First Request for Admission. The United States does not understand by this term whether Defendant seeks an admission that such replacement has occurred (a) more than once in the electric utility industry, (b) above some threshold percentage of electric utility plants, or (c) at a majority of electric utility plants. Furthermore, the United States objects to this Request to the extent it seeks information not relevant to this case. Whether a replacement is "common in the industry" is irrelevant to whether that replacement is routine. The appropriate frame of reference for a "routineness" determination is what is "routine" at a unit of the same "type," i.e., in the particular source category (as opposed to some other source category), and that the inquiry focuses on, among other things, whether the project is of a sort which would frequently be performed at an *individual unit* of that type rather than across

all units within the source category. The United States knows of no evidence indicating that the replacement of sections of waterwall tubes is of a sort which would be frequently performed at an individual coal-fired electric utility unit. The United States has made reasonable inquiry and the information known or readily available to the United States at this time is insufficient to enable it to admit or deny this Request.

Request for Admission 132: Admit that replacement of economizers on coal-fired electric utility units is common in the electric utility industry.

RESPONSE: The United States Objects to this Request because it is vague and ambiguous. The term "common" is not defined in Defendant's First Request for Admission. The United States does not understand by this term whether Defendant seeks an admission that such replacement has occurred (a) more than once in the electric utility industry, (b) above some threshold percentage of electric utility plants, or (c) at a majority of electric utility plants. Furthermore, the United States objects to this Request to the extent it seeks information not relevant to this case. Whether a replacement is "common in the industry" is irrelevant to whether that replacement is routine. The appropriate frame of reference for a "routineness" determination is what is "routine" at a unit of the same "type," i.e., in the particular source category (as opposed to some other source category), and that the inquiry focuses on, among other things, whether the project is of a sort which would frequently be performed at an *individual unit* of that type rather than across all units within the source category. The United States knows of no evidence indicating that the replacement of economizers is of a sort which would be frequently performed at an individual coal-fired electric utility unit. The United States has made reasonable inquiry and the information known or readily available to the United States at this time is insufficient to enable it to admit or deny this Request.

Request for Admission 133: Admit that replacements of superheater sections on coal-fired utility units are common in the electric utility industry.

RESPONSE: The United States Objects to this Request because it is vague and ambiguous. The term "common" is not defined in Defendant's First Request for Admission. The United States does not understand by this term whether Defendant seeks an admission that such replacements have occurred (a) more than once in the electric utility industry, (b) above some threshold percentage of electric utility plants, or (c) at a majority of electric utility plants. Furthermore, the United States objects to this Request to the extent it seeks information not relevant to this case. Whether a replacement is "common in the industry" is irrelevant to whether that replacement is routine. The appropriate frame of reference for a "routineness" determination is what is "routine" at a unit of the same "type," i.e., in the particular source category (as opposed to some other source category), and that the inquiry focuses on, among other things, whether the project is of a sort which would frequently be performed at an *individual unit* of that type rather than across all units within the source category. The United States knows of no evidence indicating that replacements of superheater sections are of a sort which would be frequently performed at an individual coal-fired electric utility unit. The United States has made reasonable inquiry and the

information known or readily available to the United States at this time is insufficient to enable it to admit or deny this Request.

Request for Admission 134: Admit that replacement of reheater sections on coal-fired electric utility units is common in the electric utility industry.

RESPONSE: The United States Objects to this Request because it is vague and ambiguous. The term "common" is not defined in Defendant's First Request for Admission. The United States does not understand by this term whether Defendant seeks an admission that such replacement has occurred (a) more than once in the electric utility industry, (b) above some threshold percentage of electric utility plants, or (c) at a majority of electric utility plants. Furthermore, the United States objects to this Request to the extent it seeks information not relevant to this case. Whether a replacement is "common in the industry" is irrelevant to whether that replacement is routine. The appropriate frame of reference for a "routineness" determination is what is "routine" at a unit of the same "type," i.e., in the particular source category (as opposed to some other source category), and that the inquiry focuses on, among other things, whether the project is of a sort which would frequently be performed at an *individual unit* of that type rather than across all units within the source category. The United States knows of no evidence indicating that the replacement of reheater sections is of a sort which would be frequently performed at an individual coal-fired electric utility unit. The United States has made reasonable inquiry and the information known or readily available to the United States at this time is insufficient to enable it to admit or deny this Request.

Request for Admission 135: Admit that turbine blade replacement on coal-fired electric utility units is common in the electric utility industry.

RESPONSE: The United States Objects to this Request because it is vague and ambiguous. The term "common" is not defined in Defendant's First Request for Admission. The United States does not understand by this term whether Defendant seeks an admission that such replacement has occurred (a) more than once in the electric utility industry, (b) above some threshold percentage of electric utility plants, or (c) at a majority of electric utility plants. Furthermore, the United States objects to this Request to the extent it seeks information not relevant to this case. Whether a replacement is "common in the industry" is irrelevant to whether that replacement is routine. The appropriate frame of reference for a "routineness" determination is what is "routine" at a unit of the same "type," i.e., in the particular source category (as opposed to some other source category), and that the inquiry focuses on, among other things, whether the project is of a sort which would frequently be performed at an *individual unit* of that type rather than across all units within the source category. The United States knows of no evidence indicating that the replacement of turbine blades is of a sort which would be frequently performed at an individual coal-fired electric utility unit. The United States has made reasonable inquiry and the information known or readily available to the United States at this time is insufficient to enable it to admit or deny this Request.

Request for Admission 136: Admit that turbine roater replacement on coal-fired electric utility units is common in the electric utility industry.

RESPONSE: The United States Objects to this Request because it is vague and ambiguous. The term "common" is not defined in Defendant's First Request for Admission. The United States does not understand by this term whether Defendant seeks an admission that such replacement has occurred (a) more than once in the electric utility industry, (b) above some threshold percentage of electric utility plants, or (c) at a majority of electric utility plants. Furthermore, the United States objects to this Request to the extent it seeks information not relevant to this case. Whether a replacement is "common in the industry" is irrelevant to whether that replacement is routine. The appropriate frame of reference for a "routineness" determination is what is "routine" at a unit of the same "type," i.e., in the particular source category (as opposed to some other source category), and that the inquiry focuses on, among other things, whether the project is of a sort which would frequently be performed at an *individual unit* of that type rather than across all units within the source category. The United States knows of no evidence indicating that the replacement of turbine roater is of a sort which would be frequently performed at an individual coal-fired electric utility unit. The United States has made reasonable inquiry and the information known or readily available to the United States at this time is insufficient to enable it to admit or deny this Request.

Request for Admission 137: Admit that rewinding of generator stators on coal-fired electric utility units is common in the electric utility industry.

RESPONSE: The United States Objects to this Request because it is vague and ambiguous. The term "common" is not defined in Defendant's First Request for Admission. The United States does not understand by this term whether Defendant seeks an admission that such rewinding has occurred (a) more than once in the electric utility industry, (b) above some threshold percentage of electric utility plants, or (c) at a majority of electric utility plants. Furthermore, the United States objects to this Request to the extent it seeks information not relevant to this case. Whether rewinding is "common in the industry" is irrelevant to whether that rewinding is routine. The appropriate frame of reference for a "routineness" determination is what is "routine" at a unit of the same "type," i.e., in the particular source category (as opposed to some other source category), and that the inquiry focuses on, among other things, whether the project is of a sort which would frequently be performed at an *individual unit* of that type rather than across all units within the source category. The United States knows of no evidence indicating that the rewinding of generator stators is of a sort which would be frequently performed at an individual coal-fired electric utility unit. The United States has made reasonable inquiry and the information known or readily available to the United States at this time is insufficient to enable it to admit or deny this Request.

Request for Admission 138: Admit that air preheater basket replacement on coal-fired electric utility units is common in the electric utility industry.

RESPONSE: The United States Objects to this Request because it is vague and ambiguous. The term "common" is not defined in Defendant's First Request for Admission. The United States does not understand by this term whether Defendant seeks an admission that such replacement has occurred (a) more than once in the electric utility industry, (b) above some threshold percentage of electric utility plants, or (c) at a majority of electric utility plants. Furthermore, the United States objects to this Request to the extent it seeks information not relevant to this case. Whether a replacement is "common in the industry" is irrelevant to whether that replacement is routine. The appropriate frame of reference for a "routineness" determination is what is "routine" at a unit of the same "type," i.e., in the particular source category (as opposed to some other source category), and that the inquiry focuses on, among other things, whether the project is of a sort which would frequently be performed at an *individual unit* of that type rather than across all units within the source category. The United States knows of no evidence indicating that the replacement of air preheater baskets is of a sort which would be frequently performed at an individual coal-fired electric utility unit. The United States has made reasonable inquiry and the information known or readily available to the United States at this time is insufficient to enable it to admit or deny this Request.

Request for Admission 139: Admit that retubing of condensers on coal-fired electric utility units is common in the electric utility industry.

RESPONSE: The United States Objects to this Request because it is vague and ambiguous. The term "common" is not defined in Defendant's First Request for Admission. The United States does not understand by this term whether Defendant seeks an admission that such retubing has occurred (a) more than once in the electric utility industry, (b) above some threshold percentage of electric utility plants, or (c) at a majority of electric utility plants. Furthermore, the United States objects to this Request to the extent it seeks information not relevant to this case. Whether retubing is "common in the industry" is irrelevant to whether that retubing is routine. The appropriate frame of reference for a "routineness" determination is what is "routine" at a unit of the same "type," i.e., in the particular source category (as opposed to some other source category), and that the inquiry focuses on, among other things, whether the project is of a sort which would frequently be performed at an *individual unit* of that type rather than across all units within the source category. The United States knows of no evidence indicating that the retubing of condensors is of a sort which would be frequently performed at an individual coal-fired electric utility unit. The United States has made reasonable inquiry and the information known or readily available to the United States at this time is insufficient to enable it to admit or deny this Request.

Request for Admission 140: Admit that replacement of superheater header tubes on coal-fired electric utility units is common in the electric utility industry.

RESPONSE: The United States Objects to this Request because it is vague and ambiguous. The term "common" is not defined in Defendant's First Request for Admission. The United States does not understand by this term whether Defendant seeks an admission that such replacement

has occurred (a) more than once in the electric utility industry, (b) above some threshold percentage of electric utility plants, or (c) at a majority of electric utility plants. Furthermore, the United States objects to this Request to the extent it seeks information not relevant to this case. Whether a replacement is "common in the industry" is irrelevant to whether that replacement is routine. The appropriate frame of reference for a "routineness" determination is what is "routine" at a unit of the same "type," i.e., in the particular source category (as opposed to some other source category), and that the inquiry focuses on, among other things, whether the project is of a sort which would frequently be performed at an *individual unit* of that type rather than across all units within the source category. The United States knows of no evidence indicating that the replacement of superheater header tubes is of a sort which would be frequently performed at an individual coal-fired electric utility unit. The United States has made reasonable inquiry and the information known or readily available to the United States at this time is insufficient to enable it to admit or deny this Request.

Request for Admission 141: Admit that replacement of reheater platens on coal-fired electric utility units is common in the electric utility industry.

RESPONSE: The United States Objects to this Request because it is vague and ambiguous. The term "common" is not defined in Defendant's First Request for Admission. The United States does not understand by this term whether Defendant seeks an admission that such replacement has occurred (a) more than once in the electric utility industry, (b) above some threshold percentage of electric utility plants, or (c) at a majority of electric utility plants. Furthermore, the United States objects to this Request to the extent it seeks information not relevant to this case. Whether a replacement is "common in the industry" is irrelevant to whether that replacement is routine. The appropriate frame of reference for a "routineness" determination is what is "routine" at a unit of the same "type," i.e., in the particular source category (as opposed to some other source category), and that the inquiry focuses on, among other things, whether the project is of a sort which would frequently be performed at an *individual unit* of that type rather than across all units within the source category. The United States knows of no evidence indicating that the replacement of reheater platens is of a sort which would be frequently performed at an individual coal-fired electric utility unit. The United States has made reasonable inquiry and the information known or readily available to the United States at this time is insufficient to enable it to admit or deny this Request.

Request for Admission 142: Admit the replacement of reheater crossover tubes on coal-fired electric utility units is common in the electric utility industry.

RESPONSE: The United States Objects to this Request because it is vague and ambiguous. The term "common" is not defined in Defendant's First Request for Admission. The United States does not understand by this term whether Defendant seeks an admission that such replacement has occurred (a) more than once in the electric utility industry, (b) above some threshold percentage of electric utility plants, or (c) at a majority of electric utility plants. Furthermore, the United States objects to this Request to the extent it seeks information not relevant to this case.

Whether a replacement is "common in the industry" is irrelevant to whether that replacement is routine. The appropriate frame of reference for a "routineness" determination is what is "routine" at a unit of the same "type," i.e., in the particular source category (as opposed to some other source category), and that the inquiry focuses on, among other things, whether the project is of a sort which would frequently be performed at an *individual unit* of that type rather than across all units within the source category. The United States knows of no evidence indicating that the replacement of reheater crossover tubes is of a sort which would be frequently performed at an individual coal-fired electric utility unit. The United States has made reasonable inquiry and the information known or readily available to the United States at this time is insufficient to enable it to admit or deny this Request.

Request for Admission 143: Admit that replacement of outlet pendent reheater tubes on coal-fired electric utility units is common in the electric utility industry.

RESPONSE: The United States Objects to this Request because it is vague and ambiguous. The term "common" is not defined in Defendant's First Request for Admission. The United States does not understand by this term whether Defendant seeks an admission that such replacement has occurred (a) more than once in the electric utility industry, (b) above some threshold percentage of electric utility plants, or (c) at a majority of electric utility plants. Furthermore, the United States objects to this Request to the extent it seeks information not relevant to this case. Whether a replacement is "common in the industry" is irrelevant to whether that replacement is routine. The appropriate frame of reference for a "routineness" determination is what is "routine" at a unit of the same "type," i.e., in the particular source category (as opposed to some other source category), and that the inquiry focuses on, among other things, whether the project is of a sort which would frequently be performed at an *individual unit* of that type rather than across all units within the source category. The United States knows of no evidence indicating that the replacement of outlet pendant reheater tubes is of a sort which would be frequently performed at an individual coal-fired electric utility unit. The United States has made reasonable inquiry and the information known or readily available to the United States at this time is insufficient to enable it to admit or deny this Request.

Request for Admission 144: Admit that feedwater reheater replacement on coal-fired electric utility units is common in the electric utility industry.

RESPONSE: The United States Objects to this Request because it is vague and ambiguous. The term "common" is not defined in Defendant's First Request for Admission. The United States does not understand by this term whether Defendant seeks an admission that such replacement has occurred (a) more than once in the electric utility industry, (b) above some threshold percentage of electric utility plants, or (c) at a majority of electric utility plants. Furthermore, the United States objects to this Request to the extent it seeks information not relevant to this case. Whether a replacement is "common in the industry" is irrelevant to whether that replacement is routine. The appropriate frame of reference for a "routineness" determination is what is "routine" at a unit of the same "type," i.e., in the particular source category (as opposed to some

other source category), and that the inquiry focuses on, among other things, whether the project is of a sort which would frequently be performed at an *individual unit* of that type rather than across all units within the source category. The United States knows of no evidence indicating that the replacement of feedwater reheaters is of a sort which would be frequently performed at an individual coal-fired electric utility unit. The United States has made reasonable inquiry and the information known or readily available to the United States at this time is insufficient to enable it to admit or deny this Request.

Request for Admission 145: Admit that ignition system replacement on coal-fired electric utility units is common in the electric utility industry.

RESPONSE: The United States Objects to this Request because it is vague and ambiguous. The term "common" is not defined in Defendant's First Request for Admission. The United States does not understand by this term whether Defendant seeks an admission that such replacement has occurred (a) more than once in the electric utility industry, (b) above some threshold percentage of electric utility plants, or (c) at a majority of electric utility plants. Furthermore, the United States objects to this Request to the extent it seeks information not relevant to this case. Whether a replacement is "common in the industry" is irrelevant to whether that replacement is routine. The appropriate frame of reference for a "routineness" determination is what is "routine" at a unit of the same "type," i.e., in the particular source category (as opposed to some other source category), and that the inquiry focuses on, among other things, whether the project is of a sort which would frequently be performed at an *individual unit* of that type rather than across all units within the source category. The United States knows of no evidence indicating that the replacement of ignition systems is of a sort which would be frequently performed at an individual coal-fired electric utility unit. The United States has made reasonable inquiry and the information known or readily available to the United States at this time is insufficient to enable it to admit or deny this Request.

Request for Admission 146: Admit that control system replacement on coal-fired electric utility units is common in the electric utility industry.

RESPONSE: The United States Objects to this Request because it is vague and ambiguous. The term "common" is not defined in Defendant's First Request for Admission. The United States does not understand by this term whether Defendant seeks an admission that such replacement has occurred (a) more than once in the electric utility industry, (b) above some threshold percentage of electric utility plants, or (c) at a majority of electric utility plants. Furthermore, the United States objects to this Request to the extent it seeks information not relevant to this case. Whether a replacement is "common in the industry" is irrelevant to whether that replacement is routine. The appropriate frame of reference for a "routineness" determination is what is "routine" at a unit of the same "type," i.e., in the particular source category (as opposed to some other source category), and that the inquiry focuses on, among other things, whether the project is of a sort which would frequently be performed at an *individual unit* of that type rather than across all units within the source category. The United States knows of no evidence indicating that the

replacement of control systems is of a sort which would be frequently performed at an individual coal-fired electric utility unit. The United States has made reasonable inquiry and the information known or readily available to the United States at this time is insufficient to enable it to admit or deny this Request.

Request for Admission 147: Admit that replacement of superheater platens on coal-fired electric utility units is common in the electric utility industry.

RESPONSE: The United States Objects to this Request because it is vague and ambiguous. The term "common" is not defined in Defendant's First Request for Admission. The United States does not understand by this term whether Defendant seeks an admission that such replacement has occurred (a) more than once in the electric utility industry, (b) above some threshold percentage of electric utility plants, or (c) at a majority of electric utility plants. Furthermore, the United States objects to this Request to the extent it seeks information not relevant to this case. Whether a replacement is "common in the industry" is irrelevant to whether that replacement is routine. The appropriate frame of reference for a "routineness" determination is what is "routine" at a unit of the same "type," i.e., in the particular source category (as opposed to some other source category), and that the inquiry focuses on, among other things, whether the project is of a sort which would frequently be performed at an *individual unit* of that type rather than across all units within the source category. The United States knows of no evidence indicating that the replacement of superheater platens is of a sort which would be frequently performed at an individual coal-fired electric utility unit. The United States has made reasonable inquiry and the information known or readily available to the United States at this time is insufficient to enable it to admit or deny this Request.

Request for Admission 148: Admit that replacement of superheater crossover elbows on coal-fired electric utility units is common in the electric utility industry.

RESPONSE: The United States Objects to this Request because it is vague and ambiguous. The term "common" is not defined in Defendant's First Request for Admission. The United States does not understand by this term whether Defendant seeks an admission that such replacement has occurred (a) more than once in the electric utility industry, (b) above some threshold percentage of electric utility plants, or (c) at a majority of electric utility plants. Furthermore, the United States objects to this Request to the extent it seeks information not relevant to this case. Whether a replacement is "common in the industry" is irrelevant to whether that replacement is routine. The appropriate frame of reference for a "routineness" determination is what is "routine" at a unit of the same "type," i.e., in the particular source category (as opposed to some other source category), and that the inquiry focuses on, among other things, whether the project is of a sort which would frequently be performed at an *individual unit* of that type rather than across all units within the source category. The United States knows of no evidence indicating that the replacement of superheater crossover elbows is of a sort which would be frequently performed at an individual coal-fired electric utility unit. The United States has made reasonable inquiry and the information known or readily available to the United States at this time is insufficient to

enable it to admit or deny this Request.

Request for Admission 149: Admit that replacement of bottom ash hopper tubes on coal-fired electric utility units is common in the electric utility industry.

RESPONSE: The United States Objects to this Request because it is vague and ambiguous. The term "common" is not defined in Defendant's First Request for Admission. The United States does not understand by this term whether Defendant seeks an admission that such replacement has occurred (a) more than once in the electric utility industry, (b) above some threshold percentage of electric utility plants, or (c) at a majority of electric utility plants. Furthermore, the United States objects to this Request to the extent it seeks information not relevant to this case. Whether a replacement is "common in the industry" is irrelevant to whether that replacement is routine. The appropriate frame of reference for a "routineness" determination is what is "routine" at a unit of the same "type," i.e., in the particular source category (as opposed to some other source category), and that the inquiry focuses on, among other things, whether the project is of a sort which would frequently be performed at an *individual unit* of that type rather than across all units within the source category. The United States knows of no evidence indicating that the replacement of bottom ash hopper tubes is of a sort which would be frequently performed at an individual coal-fired electric utility unit. The United States has made reasonable inquiry and the information known or readily available to the United States at this time is insufficient to enable it to admit or deny this Request.

Request for Admission 150: Admit that precipitator rebuilds on coal-fired electric utility units is common in the electric utility industry.

RESPONSE: The United States Objects to this Request because it is vague and ambiguous. The term "common" is not defined in Defendant's First Request for Admission. The United States does not understand by this term whether Defendant seeks an admission that such rebuilds have occurred (a) more than once in the electric utility industry, (b) above some threshold percentage of electric utility plants, or (c) at a majority of electric utility plants. Furthermore, the United States objects to this Request to the extent it seeks information not relevant to this case. Whether a rebuild is "common in the industry" is irrelevant to whether that rebuild is routine. The appropriate frame of reference for a "routineness" determination is what is "routine" at a unit of the same "type," i.e., in the particular source category (as opposed to some other source category), and that the inquiry focuses on, among other things, whether the project is of a sort which would frequently be performed at an *individual unit* of that type rather than across all units within the source category. The United States knows of no evidence indicating that precipitator rebuilds are of a sort which would be frequently performed at an individual coal-fired electric utility unit. The United States has made reasonable inquiry and the information known or readily available to the United States at this time is insufficient to enable it to admit or deny this Request.

Request for Admission 151: Admit that asbestos insulation replacement on coal-fired electric

utility units is common in the electric utility industry.

RESPONSE: The United States Objects to this Request because it is vague and ambiguous. The term "common" is not defined in Defendant's First Request for Admission. The United States does not understand by this term whether Defendant seeks an admission that such replacement has occurred (a) more than once in the electric utility industry, (b) above some threshold percentage of electric utility plants, or (c) at a majority of electric utility plants. Furthermore, the United States objects to this Request to the extent it seeks information not relevant to this case. Whether a replacement is "common in the industry" is irrelevant to whether that replacement is routine. The appropriate frame of reference for a "routineness" determination is what is "routine" at a unit of the same "type," i.e., in the particular source category (as opposed to some other source category), and that the inquiry focuses on, among other things, whether the project is of a sort which would frequently be performed at an *individual unit* of that type rather than across all units within the source category. The United States knows of no evidence indicating that the replacement of asbestos insulation is of a sort which would be frequently performed at an individual coal-fired electric utility unit. The United States has made reasonable inquiry and the information known or readily available to the United States at this time is insufficient to enable it to admit or deny this Request.

Request for Admission 152: Admit that horizontal reheater replacement on coal-fired electric utility units is common in the electric utility industry.

RESPONSE: The United States Objects to this Request because it is vague and ambiguous. The term "common" is not defined in Defendant's First Request for Admission. The United States does not understand by this term whether Defendant seeks an admission that such replacement has occurred (a) more than once in the electric utility industry, (b) above some threshold percentage of electric utility plants, or (c) at a majority of electric utility plants. Furthermore, the United States objects to this Request to the extent it seeks information not relevant to this case. Whether a replacement is "common in the industry" is irrelevant to whether that replacement is routine. The appropriate frame of reference for a "routineness" determination is what is "routine" at a unit of the same "type," i.e., in the particular source category (as opposed to some other source category), and that the inquiry focuses on, among other things, whether the project is of a sort which would frequently be performed at an *individual unit* of that type rather than across all units within the source category. The United States knows of no evidence indicating that the replacement of horizontal reheaters is of a sort which would be frequently performed at an individual coal-fired electric utility unit. The United States has made reasonable inquiry and the information known or readily available to the United States at this time is insufficient to enable it to admit or deny this Request.

Request for Admission 153: Admit that the installation of low Nox burners on coal-fired electric utility units is common in the electric utility industry.

RESPONSE: The United States Objects to this Request because it is vague and ambiguous. The

term "common" is not defined in Defendant's First Request for Admission. The United States does not understand by this term whether Defendant seeks an admission that such installation has occurred (a) more than once in the electric utility industry, (b) above some threshold percentage of electric utility plants, or (c) at a majority of electric utility plants. Furthermore, the United States objects to this Request to the extent it seeks information not relevant to this case. Whether an installation is "common in the industry" is irrelevant to whether that installation is routine. The appropriate frame of reference for a "routineness" determination is what is "routine" at a unit of the same "type," i.e., in the particular source category (as opposed to some other source category), and that the inquiry focuses on, among other things, whether the project is of a sort which would frequently be performed at an *individual unit* of that type rather than across all units within the source category. The United States knows of no evidence indicating that the installation of low Nox burners is of a sort which would be frequently performed at an individual coal-fired electric utility unit. The United States has made reasonable inquiry and the information known or readily available to the United States at this time is insufficient to enable it to admit or deny this Request.

Request for Admission 154: Admit that repairing ID fan motors on coal-fired electric utility units is common in the electric utility industry.

RESPONSE: The United States Objects to this Request because it is vague and ambiguous. The term "common" is not defined in Defendant's First Request for Admission. The United States does not understand by this term whether Defendant seeks an admission that such repairs have occurred (a) more than once in the electric utility industry, (b) above some threshold percentage of electric utility plants, or (c) at a majority of electric utility plants. Furthermore, the United States objects to this Request to the extent it seeks information not relevant to this case. Whether a repair is "common in the industry" is irrelevant to whether that repair is routine. The appropriate frame of reference for a "routineness" determination is what is "routine" at a unit of the same "type," i.e., in the particular source category (as opposed to some other source category), and that the inquiry focuses on, among other things, whether the project is of a sort which would frequently be performed at an *individual unit* of that type rather than across all units within the source category. The United States knows of no evidence indicating that the repair of ID fan motors is of a sort which would be frequently performed at an individual coal-fired electric utility unit. The United States has made reasonable inquiry and the information known or readily available to the United States at this time is insufficient to enable it to admit or deny this Request.

Request for Admission 155: Admit that replacement of the main steam drain on coal-fired electric utility units is common in the electric utility industry.

RESPONSE: The United States Objects to this Request because it is vague and ambiguous. The term "common" is not defined in Defendant's First Request for Admission. The United States does not understand by this term whether Defendant seeks an admission that such replacement has occurred (a) more than once in the electric utility industry, (b) above some threshold

percentage of electric utility plants, or (c) at a majority of electric utility plants. Furthermore, the United States objects to this Request to the extent it seeks information not relevant to this case. Whether a replacement is "common in the industry" is irrelevant to whether that replacement is routine. The appropriate frame of reference for a "routineness" determination is what is "routine" at a unit of the same "type," i.e., in the particular source category (as opposed to some other source category), and that the inquiry focuses on, among other things, whether the project is of a sort which would frequently be performed at an *individual unit* of that type rather than across all units within the source category. The United States knows of no evidence indicating that the replacement of a main steam drain is of a sort which would be frequently performed at an individual coal-fired electric utility unit. The United States has made reasonable inquiry and the information known or readily available to the United States at this time is insufficient to enable it to admit or deny this Request.

Request for Admission 156: Admit that replacement of the cold gas duct on coal-fired electric utility units is common in the electric utility industry.

RESPONSE: The United States Objects to this Request because it is vague and ambiguous. The term "common" is not defined in Defendant's First Request for Admission. The United States does not understand by this term whether Defendant seeks an admission that such replacement has occurred (a) more than once in the electric utility industry, (b) above some threshold percentage of electric utility plants, or (c) at a majority of electric utility plants. Furthermore, the United States objects to this Request to the extent it seeks information not relevant to this case. Whether a replacement is "common in the industry" is irrelevant to whether that replacement is routine. The appropriate frame of reference for a "routineness" determination is what is "routine" at a unit of the same "type," i.e., in the particular source category (as opposed to some other source category), and that the inquiry focuses on, among other things, whether the project is of a sort which would frequently be performed at an *individual unit* of that type rather than across all units within the source category. The United States knows of no evidence indicating that the replacement of a cold gas duct is of a sort which would be frequently performed at an individual coal-fired electric utility unit. The United States has made reasonable inquiry and the information known or readily available to the United States at this time is insufficient to enable it to admit or deny this Request.

Request for Admission 157: Admit that boiler hot air duct replacement on coal-fired electric utility units is common in the electric utility industry.

RESPONSE: The United States Objects to this Request because it is vague and ambiguous. The term "common" is not defined in Defendant's First Request for Admission. The United States does not understand by this term whether Defendant seeks an admission that such replacement has occurred (a) more than once in the electric utility industry, (b) above some threshold percentage of electric utility plants, or (c) at a majority of electric utility plants. Furthermore, the United States objects to this Request to the extent it seeks information not relevant to this case. Whether a replacement is "common in the industry" is irrelevant to whether that replacement is

routine. The appropriate frame of reference for a "routineness" determination is what is "routine" at a unit of the same "type," i.e., in the particular source category (as opposed to some other source category), and that the inquiry focuses on, among other things, whether the project is of a sort which would frequently be performed at an *individual unit* of that type rather than across all units within the source category. The United States knows of no evidence indicating that the replacement of a boiler hot air duct is of a sort which would be frequently performed at an individual coal-fired electric utility unit. The United States has made reasonable inquiry and the information known or readily available to the United States at this time is insufficient to enable it to admit or deny this Request.

Request for Admission 158: Admit that main steam drain piping replacement on coal-fired electric utility units is common in the electric utility industry.

RESPONSE: The United States Objects to this Request because it is vague and ambiguous. The term "common" is not defined in Defendant's First Request for Admission. The United States does not understand by this term whether Defendant seeks an admission that such replacement has occurred (a) more than once in the electric utility industry, (b) above some threshold percentage of electric utility plants, or (c) at a majority of electric utility plants. Furthermore, the United States objects to this Request to the extent it seeks information not relevant to this case. Whether a replacement is "common in the industry" is irrelevant to whether that replacement is routine. The appropriate frame of reference for a "routineness" determination is what is "routine" at a unit of the same "type," i.e., in the particular source category (as opposed to some other source category), and that the inquiry focuses on, among other things, whether the project is of a sort which would frequently be performed at an *individual unit* of that type rather than across all units within the source category. The United States knows of no evidence indicating that the replacement of main steam drain piping is of a sort which would be frequently performed at an individual coal-fired electric utility unit. The United States has made reasonable inquiry and the information known or readily available to the United States at this time is insufficient to enable it to admit or deny this Request.

Request for Admission 159: Admit that steampath replacement on coal-fired electric utility units is common in the electric utility industry.

RESPONSE: The United States Objects to this Request because it is vague and ambiguous. The term "common" is not defined in Defendant's First Request for Admission. The United States does not understand by this term whether Defendant seeks an admission that such replacement has occurred (a) more than once in the electric utility industry, (b) above some threshold percentage of electric utility plants, or (c) at a majority of electric utility plants. Furthermore, the United States objects to this Request to the extent it seeks information not relevant to this case. Whether a replacement is "common in the industry" is irrelevant to whether that replacement is routine. The appropriate frame of reference for a "routineness" determination is what is "routine" at a unit of the same "type," i.e., in the particular source category (as opposed to some other source category), and that the inquiry focuses on, among other things, whether the project is

of a sort which would frequently be performed at an *individual unit* of that type rather than across all units within the source category. The United States knows of no evidence indicating that steampath replacement is of a sort which would be frequently performed at an individual coal-fired electric utility unit. The United States has made reasonable inquiry and the information known or readily available to the United States at this time is insufficient to enable it to admit or deny this Request.

Request for Admission 160: Admit that boiler feed pump valve repair on coal-fired electric utility units is common in the electric utility industry.

RESPONSE: The United States Objects to this Request because it is vague and ambiguous. The term "common" is not defined in Defendant's First Request for Admission. The United States does not understand by this term whether Defendant seeks an admission that such repairs have occurred (a) more than once in the electric utility industry, (b) above some threshold percentage of electric utility plants, or (c) at a majority of electric utility plants. Furthermore, the United States objects to this Request to the extent it seeks information not relevant to this case. Whether a repair is "common in the industry" is irrelevant to whether that repair is routine. The appropriate frame of reference for a "routineness" determination is what is "routine" at a unit of the same "type," i.e., in the particular source category (as opposed to some other source category), and that the inquiry focuses on, among other things, whether the project is of a sort which would frequently be performed at an *individual unit* of that type rather than across all units within the source category. The United States knows of no evidence indicating that the repair of boiler feed pump valves is of a sort which would be frequently performed at an individual coal-fired electric utility unit. The United States has made reasonable inquiry and the information known or readily available to the United States at this time is insufficient to enable it to admit or deny this Request.

Request for Admission 161: Admit that pressure piping inspection on coal-fired electric utility units is common in the electric utility industry.

RESPONSE: The United States Objects to this Request because it is vague and ambiguous. The term "common" is not defined in Defendant's First Request for Admission. The United States does not understand by this term whether Defendant seeks an admission that such inspection has occurred (a) more than once in the electric utility industry, (b) above some threshold percentage of electric utility plants, or (c) at a majority of electric utility plants. Furthermore, the United States objects to this Request to the extent it seeks information not relevant to this case. Whether an inspection is "common in the industry" is irrelevant to whether that inspection is routine. The appropriate frame of reference for a "routineness" determination is what is "routine" at a unit of the same "type," i.e., in the particular source category (as opposed to some other source category), and that the inquiry focuses on, among other things, whether the project is of a sort which would frequently be performed at an *individual unit* of that type rather than across all units within the source category. The United States knows of no evidence indicating that the inspection of pressure piping is of a sort which would be frequently performed at an individual

EXHIBIT M TO DETROIT EDISON'S BRIEF IN SUPPORT OF MOTION TO STRIKE

229.

THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

2003 AUG -4 P 3:50

FILED
U.S. DISTRICT COURT
GREENSBORO, NC

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
and	)	
	)	
ENVIRONMENTAL DEFENSE, ET AL.,	)	
	)	
Plaintiff-Intervenors,	)	
	)	
v.	)	Civil Action No. 1:00 CV 1262
	)	
DUKE ENERGY CORPORATION,	)	
	)	
Defendant.	)	

UNITED STATES' OPPOSITION TO DUKE ENERGY'S MOTION TO DETERMINE THE SUFFICIENCY OF PLAINTIFF'S RESPONSES TO DUKE'S FIRST REQUEST FOR ADMISSIONS

The United States of America ("United States") respectfully submits this memorandum in opposition to Defendant Duke Energy Corporation's ("Duke") Motion to Determine the Sufficiency of Plaintiff's Responses to Duke's First Request for Admissions (Docket No. 226).

INTRODUCTION

Duke's motion has no merit. The United States' responses were appropriate to Duke's Requests for Admissions ("RFAs"), which were improperly phrased so as to be unanswerable without qualification or objection. The real purpose of Duke's motion is to deflect attention from Duke's own refusal to comply with a prior discovery order of this Court and from Duke's evasion of its obligations under Rule 36. This is apparent from the timing of Duke's motion. The United States served the responses that are the subject of Duke's motion on December 10, 2002. Seven months later, Duke has filed a motion complaining about these answers. What has

happened in the interim? On January 6, 2003, the United States filed a motion to determine the sufficiency of *Duke's* responses to hundreds of Requests for Admissions (Docket No. 110), and on February 10, 2003, this Court issued an Order requiring Duke to provide supplemental responses to more than 600 Requests (Docket No. 137). In disregard of the Court's order, Duke raised new objections and served new artful, evasive responses, forcing the United States to file a second motion regarding the same RFAs on June 3, 2003 (Docket No. 207). That motion is currently pending before the Court.

Only now, called to task for its repeated failure to provide adequate responses to hundreds of Requests for Admissions, does Duke determine that there are deficiencies in the government's responses served last year that require a retaliatory motion to the Court.[1] The result is a strained and unsupportable effort to equate the claimed shortcomings in the United States' responses to a small number of Requests to Duke's blanket resistance to compliance with the Federal Rules. Apparently recognizing that the Court may rule against it with respect to its own responses to the United States' RFAs, Duke asks the Court to "deem admitted Plaintiff's responses . . . to the same extent that it does so with respect to Plaintiff's challenge to Duke's responses," and argues that "[i]f Plaintiff is correct that Duke has not complied with Rule 36, then neither has Plaintiff." Duke Memorandum in Support of Motion to Determine Sufficiency ("Duke Memo"), at 2, 3 (Docket No. 227).

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[1] Duke originally raised concerns with just four of the United States' responses, on December 31, 2002. See Ex. B to Duke Memo. In response, the United States further explained its responses to these four requests and offered to respond to narrowed requests. See Jan. 10, 2003 Letter from D. Beckhard to N. Long (attached as Ex. 1). It was not until five months later, after seeing its own deficient responses serve as the subject of two motions and one Order, that Duke suddenly decided that these and many additional responses by the United States warranted an additional meet and confer process. See Ex. C to Duke Memo.

The parties' respective RFA responses, however, demand a more individualized review than Duke's "split the baby" approach suggests. Although the United States agrees with Duke that the same standards under Fed. R. Civ. P. 36 apply to both Duke's and the United States' responses, a close inspection reveals that the United States' responses stand in marked contrast to the deficient responses provided by Duke. Just as Duke engaged in artful evasions in response to the United States' straightforward requests, a close review of each of Duke's requests demonstrates that Duke was not attempting to narrow the issues for trial, but rather was attempting to force the United States to adopt legal conclusions or artful statements of half-truths. Given Duke's inappropriate requests, good faith required the United States to qualify many of its responses, or explain why it was unable to admit or deny, as directed by Rule 36(a). The United States' responses are thus sufficient to meet the requirements of Fed. R. Civ. P. 36, and Duke's motion should be denied.

ARGUMENT

I. The Requests For Admission Have Been Fully and Appropriately Answered.

Duke's claim that the United States' responses are "evasive" and rest on "invalid" objections is unfounded. Requests for admissions serve a valuable function in narrowing issues for trial because all matters admitted are deemed "conclusively established." Fed. R. Civ. P. 36(b). Accordingly, it is incumbent upon a party responding to requests for admissions to consider its responses very carefully, to ensure that any admissions will not later be found to be erroneous or based on a misunderstanding of the request. Although Duke would rather the United States have admitted its requests, a party need not adopt artful statements of half-truths or legal conclusions proffered in the guise of requests to admit. In fact, Rule 36 provides that

responding parties qualify their answers when necessary to avoid this very tactic. As discussed below, Duke's requests are objectionable and unanswerable as phrased. Nevertheless, where possible, the United States has in fact provided responses that "fairly meet the substance of the requested admission[s]." Fed. R. Civ. P. 36(a). Duke just does not like the answers.

A. Requests for Admission Nos. 131 to 191.

Duke is frustrated that the United States was unable to admit or deny requests that ask the United States to admit that certain projects undertaken by Duke are "common in the electric utility industry." Duke's frustration, however, is attributable not to the United States' responses, but to the requests themselves. These requests have at least two fundamental problems that prevent the United States from being able to issue an unqualified admission or denial: they seek what Duke characterizes to be a determinative legal conclusion, and they are so vague as to be unanswerable.

1. Requests 131-191 seek admissions that certain repairs are "common in the industry," a test which Duke contends is wholly determinative of whether PSD applies.

First, these requests seek an answer that, to Duke, is equivalent to a legal conclusion. Under Duke's (incorrect) legal interpretation of the routine maintenance exemption, one would look only at whether a project is "common in the industry." Duke has repeatedly stated that this is the test, and the only test, for whether a project is "routine maintenance, repair or replacement" under the PSD modification rules. See, e.g., Duke Response to Interrogatory No. 74, at 29, 35, 37 (attached as Ex. 9 to U.S. Memo in Support of Motion for Partial Summary Judgment (Docket No. 133)); see also Duke Brief in Support of Motion for Summary Judgment, at 13-15, 19-21, 35-37, 39-40 (Docket No. 129); Duke Brief in Opposition to U.S. Motion for Partial Summary

Judgment, at 15 (Docket No. 160). Thus, Duke's Requests seek admissions equivalent to a legal conclusion that modifications of the types specified in its requests do *not* trigger the requirements of PSD.

The United States has consistently denied that this is the proper legal test. As described in our summary judgment briefs, the proper test for the "routine maintenance" exemption is a multi-factor test that examines nature/extent, purpose, cost, and frequency of the repair at the individual unit. The dispute regarding the proper legal test is squarely before the Court in connection with the parties' motions for summary judgment.

By proffering Request Nos. 131-191, Duke sought to elicit an irrelevant fact which it could later characterize as a legal conclusion in the hope that this Court ultimately decides to reject EPA's authoritative interpretation and instead use Duke's. In order to avoid any possibility of confusion on this point, the United States clearly explained in its objections that Duke's view is not the correct interpretation of the routine maintenance test. Rather, the United States explained that "The appropriate frame of reference for a 'routineness' determination is what is 'routine' at a unit of the same 'type,' i.e., in the particular source category (as opposed to some other source category), and that the inquiry focuses on, among other things, whether the project is of a sort which would frequently be performed at an *individual unit* of that type rather than across all units within the source category."[2] Duke's decision to use a term with (under its discredited

[2] Duke incorrectly claims that the United States' relevance objection contradicts its arguments made before the Court on summary judgment. The United States' position on this point is clear – what is relevant to the routine maintenance determination is not how frequent a project may have been performed in the industry as whole, as Duke argues, but rather how frequent a project is expected to be done at a unit in that industry. Although a source seeking to convince EPA that it is entitled to the routine maintenance exemption may well point to how frequently projects are done at other units in the industry,
(continued...)

version of the routine maintenance test) legal significance thus left the United States with no choice but to object as it did, so as to avoid even implying such a legal conclusion.

2. Duke refused to articulate any criteria or threshold to determine whether a project is "common," and Duke's own inconsistent use of the term in this litigation demonstrates that it is vague and ambiguous.

Second, and more to the point, the vague and ambiguous nature of the term "common" as used by Duke renders the requests improper. In its ordinary usage, the term "common" requires a subjective comparison and the application of some threshold test that distinguishes between projects that are "common" from those that are "uncommon" or "rare." Duke's Requests provided no definition or other assistance to determine the applicable criteria or thresholds for distinguishing between "common" and "uncommon." It was the absence of this definition that made it impossible for the United States to admit or deny these requests.

The problem is compounded by Duke's studied refusal, throughout this litigation, to articulate any coherent criteria for the "common in the industry" test that Duke contends is wholly determinative of whether a project is "routine maintenance." For example, Duke's expert witness initially testified that he might consider a project to be "common in the industry" if it had occurred at 3% to 5% of all of the similar units in the industry, but backed away and stated that it was a "starting point" of an analysis that lacks either coherent criteria or a basis in applicable

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(...continued)
this "incidence in the industry" information would be relevant only to the extent it shows how frequently projects are done in the lifetime of individual units in that industry. For instance, just because a project has never before been done at a particular unit does not necessarily mean that it is non-routine, if it is the type of project that is frequently done during the life of units in that source category. However, the simple fact that a project has been performed at other sources in the industry as a whole is not the relevant measure of routineness for purposes of EPA's exemption. This point was explained in the United States' summary judgment briefing, and is completely consistent with the United States' relevance objection to Duke's RFA Nos. 131-191.

precedent. See William Tuppeny Tr., at 167-173 (attached as Ex. 117 to Duke Brief in Support of Motion for Summary Judgment (Docket No. 129)). This testimony did not provide useful criteria for the United States to apply in responding to these Requests.

The testimony of Duke's Rule 30(b)(6) witness regarding Duke's interpretation of the "common in the industry" tests is similarly confusing and unhelpful. When asked whether Duke considered replacement of all the waterwalls in a boiler to be "common in the industry," Duke's 30(b)(6) witness stated that such a project "is certainly conceivable from a hypothetical standpoint. So it would not be frequent in its recurrence at a particular location but across the industry would be conceivable. . . . Replacement of entire waterwalls, as you have theorized, would be *less common* but across the industry could happen in various cases, various situations." Buddy Davis Tr., at 330-332 (emphasis added) (attached as Ex. 71 to U.S. Memo in Support of Motion for Partial Summary Judgment (Docket No. 133)). Duke contends that the replacement of entire waterwalls (which is one type of project that is at issue in this case) is "routine maintenance."[3] In other words, it appears that Duke also contends that a project that is "conceivable from a hypothetical standpoint" is "common in the industry" – a strange (and objectively unmeasurable) criterion indeed.

Duke's summary judgment briefs, which were filed subsequent to the United States' responses, also reveal no criteria for what is "common," although they do suggest that Duke considers the threshold to be incredibly low. Duke claims that *any* replacement involving

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[3] Duke replaced all of the waterwall tubes at Buck Unit 4, for example. See U.S. Memo in Support of Motion for Partial Summary Judgment, at 8 (Docket No. 133). Duke's 30(b)(6) witness contends Duke has never performed work that is not "routine maintenance." Buddy Davis Tr., at 384 (attached as Ex. 71 to U.S. Memo in Support of Motion for Partial Summary Judgment (Docket No. 133)).

equipment of a type that "has been repaired or replaced by sources within the relevant industrial category," (i.e. coal-fired electric steam generating units) is "routine," and therefore "common in the industry." Duke Brief in Support of Motion for Summary Judgment, at 36-37. (Docket No. 129). Duke claims that the exemption applies to *any* "maintenence, repair and replacement projects that are undertaken by sources 'within' the electric utility industry source 'category.'" Id. at 8. Elsewhere, Duke suggests that a project must be "unprecedented" to be something other than "routine maintenance." See Duke Brief in Opposition to U.S. Motion for Partial Summary Judgment, at 17 (Docket No. 160). Thus, it appears from Duke's subsequent summary judgment arguments that its "common in the industry" test is really a "precedented in the industry" test.

Thus, Duke has never offered any useful or coherent criteria or threshold for applying its "common in the industry" test. Nevertheless, in an effort to resolve part of this dispute by utilizing what appears, from Duke's subsequently-filed summary judgment briefs, to be one of Duke's interpretations of the word "common," i.e, "not unprecedented," the United States proposed to amend most or all of its responses by adding the following admission:

> The United States admits that [category of project] has occurred at some number of coal-fired utility units in the electric utility industry in addition to any such replacements performed by Duke. The United States has made reasonable inquiry and the information known or readily available to the United States at this time is insufficient to enable it to determine the precise number of incidences in which this has occurred.[4]

See Aug. 1, 2003, E-mail from D. Beckhard to N. Long (attached as Ex. 6 hereto). Duke has not yet responded to this proposed resolution (though it may still do so if it chooses), and at no time has offered any additional insight into what criteria or threshold the United States should apply in

[4] As stated in the correspondence making this offer, there is a possibility that a few of Duke's requests still could not be admitted even using a "not unprecedented" interpretation of "common."

determining whether a project was "common in the industry." As a result, the United States is simply unable to admit or deny these responses or otherwise supplement them. See Booth Oil Site Admin. Group v. Safety-Kleen Corp., 194 F.R.D. 76, 79 (W.D.N.Y. 2000) ("Ambiguous and vague requests which cannot be fairly answered will not be enforced."); Fulhorst v. United Tech. Auto., Inc., 1997 WL 873548, *1 (D. Del. 1997) (finding that request need not be responded to due to ambiguity of term "associated") (attached as Ex. 2) ; Dubin v. E.F. Hutton Group, Inc., 125 F.R.D. 372, 376 (S.D.N.Y. 1989) (denying motion to compel, as objections to the requests as "vague, ambiguous, overbroad and burdensome" were "well-founded"). Requests for admission should be phrased so that they can be admitted or denied with an absolute minimum of explanation. See United Coal Cos. v. Powell Constr. Co., 839 F.2d 958, 967-968 (3d Cir. 1988). As Duke itself has argued, "[a]ny ambiguity in a request to admit is construed against the drafter." Ortho Diagnostic Sys. Inc. v. Miles Inc., 865 F. Supp. 1073, 1079 (S.D.N.Y. 1994) (citing Talley v. United States, 990 F.2d 695, 699 (1st Cir. 1993). Given the legally determinative impact that Duke ascribes to the term "common in the industry," coupled with its complete lack of guidance on what this term means for purposes of its requests, the United States' responses to these requests more than met the requirements of Fed R. Civ. P. 36.

3. The United States has not refused to provide Duke with information about projects at other utilities.

At page 9 of its Memo, Duke incorrectly accuses the United States of "simply refus[ing] to provide Duke with information it has gathered regarding the frequency of component replacements across the industry." As a result of CAA "Section 114" information requests sent out as part of the enforcement initiative of which this case is a part, the United States has

obtained information from a number of utilities regarding replacement projects performed at a number of coal-fired utility units in the United States. Additional information of this nature has been obtained during discovery in this case and in other CAA enforcement cases involving electric utilities. As the United States explained in a 30(b)(6) deposition taken by Duke on this very topic, because "common in the industry" is not the relevant inquiry, EPA did not perform any analysis of whether certain projects it became aware of as part of this enforcement initiative are common in the industry as a whole.[5] The burden of reviewing and tabulating this voluminous information for the purpose of responding to this Request would be extraordinary but would still not enable the United States to admit or deny this Request, because Duke has still not provided any criteria for distinguishing between "common" and "uncommon" projects, and because the United States is not reasonably able to assess and attest to the accuracy of the information contained in each and every Section 114 response, or to make admissions based on such information provided by other parties.

Because of claims of business confidentiality asserted by the respondents, the United States is prohibited from providing this information directly to Duke. The United States offered to allow Duke to arrange for a third party to examine and tabulate the information contained therein, subject to an appropriate protective order that would protect the respondents' claims of business confidentiality. See Oct. 3, 2002 E-mail from R. Kaplan to T. Cottingham (attached as Ex. 4). Duke did not accept this offer, and instead was apparently satisfied with simply obtaining

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[5] See Richard Killian Depo Tr., at 21-22, 28-29, 39-41 (attached as Ex. 3). Duke apparently would require the United States to undertake a comprehensive and irrelevant statistical analysis of the so-called "114 responses" received as part of the enforcement initiative to determine whether certain projects are "common in the industry" to attempt to answer this request. But given the inherent ambiguity in Duke's requests, only Duke can really know what it means by "common in the industry."

30(b)(6) testimony confirming that the United States only analyzed the individual 114 responses to determine if projects were routine for a unit – the relevant inquiry under EPA's interpretation.[6]

Request for Admissions Nos. 131-191 did not seek "information [the United States has gathered regarding the frequency of component replacements across the industry." They sought admissions that certain projects were "common in the industry," a test that Duke contends is wholly determinative of whether the projects are "routine maintenance" and that Duke apparently contends has no relationship to *frequency* (which connotes repetition) at all. Duke's accusation regarding the United State's willingness to provide discovery is false and irrelevant.

4. The United States' position regarding Duke's requests is not inconsistent with its position regarding its own requests.

Duke claims the United States' objection to the amorphous term "common" is simply "the pot calling the kettle black" given the phrasing of the United States' own requests. A review of the parties' respective requests and responses thereto reveals that this is not true. As explained in the United States' briefs in support of its motion to determine the sufficiency of Duke's amended RFA responses (Docket No. 207), Duke manufactured confusion about the meaning of otherwise unambiguous terms to avoid answering the United States' requests. With respect to Duke's requests, on the other hand, there is simply no comparison between an inherently vague, ambiguous, and subjective term like "common" and the patently objective terms that were used

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[6] Duke's accusation that the United States did not undertake a reasonable inquiry is ironic given its own approach to responding to the United States' requests. For instance, Duke takes the United States to task for not having undertaken a completely irrelevant analysis of the frequency of certain projects in the industry as a whole, yet itself claims to be unable to admit or deny basic facts about *its own projects*. See, e.g., Duke Responses to RFAs 310, 319, 320, 321 (claiming to be unable to admit or deny requests that sought specific comparisons of cost and extent of Duke projects at issue in this case with previous Duke projects) (attached as Ex. 1 to U.S. Memo in Support of Motion to Determine Sufficiency of Duke's Amended RFA Responses (Docket No. 208)).

in the United States' requests ("reduction," "actual work," and "redesigned"). As shown above, Duke contends that whether a project is "common in the industry" is wholly determinative of whether a legal exemption from PSD applies; the term contains no intrinsic criteria for distinguishing common from uncommon, and Duke provides none. Neither of these circumstances is present with respect to the terms in the United States' Requests to which Duke objected. There is nothing inherently subjective about a term like "reduction"; one need only admit or deny the objective fact of whether an event will occur *less*. Nor is there any ambiguity in a term like "actual work" when the context of the request makes clear that the "work" referred to is the work at issue in the case (about which the parties have engaged in almost two years of discovery). Nor, in the context of the few requests by the United States which used the term, was there any ambiguity in the word "redesign" given the ordinary meaning of the term, Duke's contemporaneous use of the term, and the massive nature of the design upgrades undertaken by Duke. Whereas Duke artfully misconstrued otherwise clear terms in its responses, the United States simply explained why Duke's requests were improper and thus unanswerable as phrased. This Court should therefore reject Duke's retaliatory attempt to equate its own artful evasions with the United States' good faith objections and responses.

B. Request for Admission No. 23.

This request asks the United States to admit that the "two year period when a unit last produced power before going into ECS is more *representative of normal source operations* for that unit than the years in ECS when the unit did not produce power." Duke Request No. 23 (emphasis added). Not coincidentally, the language of this request identically tracks legal language in EPA's PSD regulations governing calculation of so-called "baseline" emissions

(against which projected future emissions are compared). These regulations state that baseline emissions generally equal emissions "during a two-year period which precedes the particular date and which is *representative of normal source operation.*" 40 C.F.R. § 51.166(b)(21)(ii) (emphasis added). Duke is thus seeking an admission concerning a legal conclusion that goes to the very heart of the dispute between the parties in this case – whether, as a legal matter, the last two years of operation of Duke's PMP units should be used to calculate the baseline period. EPA interprets its regulations as requiring that, for long-shutdown units that undergo a physical change, the baseline period will generally precede the date of each proposed physical change (i.e., a boiler rehabilitation project), not the date the unit last produced power. Thus, the United States has moved for summary judgment that the baseline emissions for Duke's Buck 4 PMP project were zero *as a matter of law* because the Buck 4 unit was taken out of service for almost a decade prior to the PMP project. See U.S. Memo in Support of Motion for Partial Summary Judgment, at 36 (Docket No. 133); U.S. Reply in Support of Motion for Partial Summary Judgment, at 8-10 (Docket No. 189). Duke, however, contends that as a legal matter the last two years of *operation* of Buck 4 rather than a two year period immediately *preceding* the change should be used for the baseline. See Duke Opp. to U.S. Summary Judgment Motion, at 38-39 (Docket No. 158).

Duke thus knows that calculation of the baseline period for its PMP units is a central legal dispute in this case. Because Duke sought an admission of a legal conclusion at the very heart of the dispute in this case, its request was objectionable on that basis alone. United Coal Cos. v. Powell Constr. Co., 839 F.2d at 967 (where "issues in dispute are requested to be admitted, a denial is a perfectly reasonable response"); Kasar v. Miller Printing Machinery Co.,

36 F.R.D. 200, 203 (W.D. Pa. 1964). The United States clearly and appropriately denied this request. And to avoid any confusion on the matter, the United States made clear that the parties remain at odds over the interpretation of EPA's PSD regulations.[7]

Duke also again tries to distract the Court with retaliatory comparisons of the United States' responses with Duke's own deficient responses. For instance, Duke claims that "[t]his response represents precisely the type of denial on the basis of legal argument of which Plaintiff complains in its motion to determine the sufficiency of Duke's responses." Duke Memo, at 10. Nothing could be further from the truth. In the present dispute, Duke inappropriately and unambiguously sought an admission of a legal conclusion at the very heart of this case – that the two year period prior to ECS was "representative of normal source operations" (a loaded legal term drawn straight from EPA's regulations) – which the United States properly denied. In contrast, the United States' requests to which Duke refers sought simple factual admissions that state environmental regulators never told Duke that its projects did not require permits. See, e.g., Duke Responses to RFA 375 (attached as Ex. 1 to U.S. Memo in Support of Motion to Determine Sufficiency of Duke's Amended RFA Responses (Docket No. 208)). Duke completely evaded this factual issue and instead responded with improper legal arguments concerning its interpretation of the PSD regulations. See U.S. Memo in Support of Motion to Determine Sufficiency of Duke's Amended RFA Responses, at 10 (Docket No. 208). By

[7] That the United States denied this request should really come as no shock to Duke. During the multi-year shutdowns of Duke's ECS units, and prior to undertaking the boiler rehabilitation at issue in this case, Duke retained an operating staff at the units and operated equipment at the units such as dehumidified air blowers. See Martin Beam Tr., at 25-26 (attached as Ex. 5). To put it bluntly, the normal operating status of Duke's ECS units *was* to produce no power.

including terms of legal significance that go to the very heart of issues in dispute in this case, Duke drafted a request to which the United States could not respond without qualification.

C. Request For Admission Nos. 26 to 29.

These requests seek admissions that EPA has "no evidence" that the States of North Carolina and South Carolina have "failed to administer or implement" or "incorrectly administered or implemented" the PSD program. In responding, the United States explained that it was unable to admit or deny the requests as written because of its limited oversight role with states like North and South Carolina, which operate under federally-approved State Implementation Plans ("SIPs"). In a follow-up letter to Duke concerning these requests, the United States further explained that it had made reasonable inquiry of EPA employees and reiterated that, in part because EPA does not have oversight authority regarding actions of federally approved SIP states like North and South Carolina, it was unable to admit or deny Duke's requests. See January 10, 2003 Letter from Dan Beckhard to Nash Long (attached as Ex. 1). The United States also explained that the requests are overly burdensome and irrelevant, and effectively ask the United States to prove a negative – to determine the non-existence of evidence that the state had incorrectly applied, or incorrectly failed to apply, the PSD program. See id. at 1-2. Although the United States explained that it could not admit or deny Duke's request as phrased, the United States did offer to respond to rephrased requests concerning any particular state actions about which Duke may have been concerned. See id. at 2. Duke, however, did not take the United States up on this offer, implying that it was less interested in obtaining admissions about particular facts than in obtaining unqualified admissions of generalized half-truths.

The half-truth Duke was hoping to elicit in proffering these requests was presumably this: If EPA has not determined that the states have incorrectly implemented the PSD program, and the states are primarily responsible for implementing the program, then Duke's modifications must be consistent with the program. However, requests that are "phrased so as to infer unfairly a particular or varied conclusion from the fact admitted are objectionable, as are requests which are half-truths, if such half-truths would imply a conclusion different from the whole truth." Kasar, 36 F.R.D. at 203 (quoting Johnstone v. Cronlund, 25 F.R.D. 42, 44 (E.D. Pa. 1960).

Significantly, although the United States could not admit or deny the requests as written, it nevertheless attempted to respond to the "essential truth" underlying the requests by stating that it is aware that the States of North and South Carolina did not apply their PSD programs to Duke's modifications. This is presumably the essential truth at which Duke is aiming – did the states correctly apply the PSD program with respect to Duke's modifications. The answer, as made clear by the United States' responses, is that the states did not apply the PSD program to Duke's modifications *at all*. This is not surprising, because Duke did not seek an applicability determination from the states about its boiler rehabilitation projects, or otherwise inform the states of the nature, extent, purpose, frequency, and cost of the projects. See, e.g., Duke Response to U.S. Request for Admission No. 374 (attached as Ex. 1 to U.S. Memo in Support of Motion to Determine Sufficiency of Duke's Amended RFA Responses (Docket No. 208).[8]

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[8] Duke did tell the states in 1983 about its plans to *shut down* the units as part of its Extended Cold Shutdown" program, and sought assurances that the simple *restart* of the units, with "minimal expenditures," would not trigger PSD and NSPS. See, e.g., Ex. 70 to U.S. Memo in Support of Motion for Partial Summary Judgment (Docket No. 133). These letters undisputably do not describe *any* of the boiler work that was actually done, which ultimately cost hundreds of millions of dollars. In fact, the letters only mentioned running dehumidified air in the boilers, which, as Duke's 30(6)(6) witness

(continued...)

D. Request for Admission Nos. 207 to 216.

These requests seek admissions that certain projects undertaken *by Duke* that were not included in the Complaint are "comparable" to other projects undertaken *by Duke* that were included in the Complaint. Duke thus curiously seeks a subjective comparison from the United States about Duke's own projects, about which Duke of course has complete information to make any comparison it may desire. Cf. Feb 10 Order, at 1 n.1 (noting that certain of the United States' requests concerned "matters within Plaintiff's knowledge") (Docket No. 137).

Even putting aside the subject of Duke's unusual requests, the United States appropriately objected to these requests because the inherently vague and ambiguous nature of the term "comparable" renders them unanswerable. See Booth Oil, 194 F.R.D. at 79; Fulhorst, 1997 WL 873548, *1; Dubin, 125 F.R.D. at 376. As with Duke's use of the term "common" in Request Nos. 131 to 191, the term "comparable" as used by Duke necessarily connotes some sort of subjective and individualized determination of whether the projects are above or below some undefined level of sameness. Again, in Duke's mind, at what point does a project start or stop being sufficiently comparable to another project for purposes of its requests? Duke offers no

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(...continued)
admitted, does not indicate that major boiler work is being done. See Ex. 155 to U.S. Memo in Opposition to Duke Motion for Summary Judgment, at 410-11 (Docket No. 152). When Duke later decided to perform major boiler rehabilitation work on its units, Duke changed the name of the Extended Cold Shutdown program to the "Plant Modernization Program" to better reflect the change in focus from preservation (ECS) to rehabilitation (PMP). *See* U.S. Memo in Support of Motion for Partial Summary Judgment, at 5 (Docket No. 133). However, Duke never told the state environmental regulators or EPA about this change in focus or about the change in the name of the program. See id., at 12; see also Ex. 11 to U.S. Memo in Support of Motion for Partial Summary Judgment, at 112-114 (Docket No. 133); Ex. 71 to U.S. Memo in Support of Motion for Partial Summary Judgment, at 249-253, 491 (Docket No. 133). Although Duke claims that the states inspected Duke's plants for compliance with PSD and concluded PSD was not applicable, in reality the inspections in question were not meant to detect the types of PSD violations at existing units that are at issue in this case. See U.S. Response to Duke Motion for Summary Judgment, at 19-20 (Docket No. 152).

criteria for making such a determination, and the United States is unable to divine from Duke's request where it might draw this line. This is unsurprising, since Duke itself is in the best position to draw comparisons about its own projects.[9]

Although it is not the United States' role to suggest to Duke how to craft its own requests, it seems that if Duke were truly interested in specific comparisons of certain Duke projects to other Duke projects, it should have provided guidance or discrete metrics against which it sought such comparisons. Indeed, this is the approach the United States itself took when it sought admissions from Duke comparing certain Duke projects in the Complaint with historic Duke projects undertaken by Duke. For instance, the United States sought admissions concerning specific criteria, such as whether certain projects *cost more* than other projects, required *more labor* than other projects, involved replacement of *more tubes* than other projects, and involved replacement of *greater percentages of tubes* than other projects.[10] Duke, by contrast, chose not to ask for comparisons of any objectively measurable criteria, such as whether certain projects cost *more or less* than others. Instead, Duke failed to define the scope of its requests and subjectively

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[9] Duke also criticizes the United States for stating that it is unable to admit or deny these requests despite the fact that *Duke* provided information about the projects in the "114 responses." Duke misconstrues the United States' response. The United States is unable to admit or deny these requests because Duke has provided no guidance on what it means by the inherently vague and ambiguous term "comparable." However, the fact that Duke claims that the information needed to respond to these requests is contained in *Duke's* 114 responses (presumably using whatever definition of "comparable" that Duke has in mind), simply highlights the fact that Duke is inappropriately seeking admissions concerning "matters within [Duke's] knowledge." Feb. 10, 2003 Order at 1 n.1 (Docket No. 137).

[10] See, e.g., U.S. Request for Admission Nos. 310, 319, 320, 321 (attached as Ex. 1 to U.S. Memo in Support of Motion to Determine Sufficiency of Duke's Amended RFA Responses (Docket No. 208). Duke, however, refused to admit or deny these requests, claiming that they were "vague and ambiguous" even though the United States provided the specific comparison criteria. Duke's current motion is thus particularly ironic given Duke's refusal to respond to the United States' requests, which are immeasurably more specific and concrete than Duke's requests.

and amorphously asked the United States to admit that certain projects were simply "comparable" in nature, purpose, frequency, or cost, to those in the Complaint. As discussed above, requests that contain such vague and ambiguous phrasing are improper.

CONCLUSION

The purpose of requests to admit is to eliminate disputes, not to bind an opponent to incorrect legal conclusions or artful statements of half-truths. The United States responded in good faith to Duke's requests, and in compliance with the requirements of Fed. R. Civ. P. 36. Duke's Motion should be denied.

Dated: August 4, 2003

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this the 4th day of August, 2003, I caused a true and correct copy of the foregoing UNITED STATES' OPPOSITION TO DUKE ENERGY'S MOTION TO DETERMINE THE SUFFICIENCY OF PLAINTIFF'S RESPONSES TO DUKE'S FIRST REQUEST FOR ADMISSIONS to be served upon the following counsel of record in this matter via electronic mail and U.S. First Class Mail.

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EXHIBIT N TO DETROIT EDISON'S BRIEF IN SUPPORT OF MOTION TO STRIKE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, ALABAMA ENVIRONMENTAL COUNCIL, Plaintiff-Intervenor, v. ALABAMA POWER COMPANY, Defendant.	CASE NO.: CV 01-HS-0152-S

UNITED STATES' REPLY MEMORANDUM OF LAW REGARDING THE CORRECT LEGAL TEST FOR DETERMINING WHETHER THERE HAS BEEN A "MODIFICATION" FOR PURPOSES OF THE CLEAN AIR ACT'S PREVENTION OF SIGNIFICANT DETERIORATION PROVISIONS

October 28, 2004

2. EPA's Routine Maintenance Test Does Not Disregard "Industry Practice" or Exclude Only Activities Performed Frequently at the Plant or Unit in Question

Alabama Power misstates EPA's routine maintenance test at several junctures in its brief. As we have noted, Alabama Power incorrectly suggests that EPA, while once endorsing its version of an "industry practice" test, has for this litigation abandoned that test in favor of one that ignores industry practice. *See supra* pp. 29-30, 37-40, 42, 48-50. In a similar vein, Alabama Power misstates EPA's interpretation of the routine maintenance exclusion as excluding only those activities that are performed frequently at the plant or unit in question. AP Brief at 52-53. These misstatements of EPA's test are intended to show that EPA has unlawfully excluded consideration of industry practice. We explain elsewhere that, in fact, while focusing the inquiry at the unit level, EPA has long considered industry practice, and continues to do so under the interpretation of its routine maintenance exclusion that the United States relies on in this litigation. *See supra* pp. 29-30; US Brief at 50-51, 54-57.

CONCLUSION

For the foregoing reasons, and those set forth in the United States' opening brief, the Court should adopt as controlling in this action the legal tests the United States set forth in its opening brief for determining whether, for PSD purposes, a physical or operational change increases emissions, and for determining whether such a change is exempt from permitting under the routine maintenance exclusion.

F.2d at 918 n.14.

EXHIBIT O TO DETROIT EDISON'S BRIEF IN SUPPORT OF MOTION TO STRIKE

THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA, Plaintiff, and ENVIRONMENTAL DEFENSE, ET AL., Plaintiff-Intervenors, v. DUKE ENERGY CORPORATION Defendant.	Civil Action No. 1:00 CV 1262

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION TO VACATE APRIL 14, 2004 AND AUGUST 26, 2003 ORDERS AND JUDGMENTS

> extend the useful economic life of the plant/unit generally should not be considered routine maintenance, repair, or replacement. A common sense approach is suggested.

Letter from Charles Whitmore, EPA Region 7, at 1-2 (Dec. 1, 1989) (underline in original) (Ex. 13). In 1995, EPA determined that changes to power plant burner arrays were not routine, without any reference to whether similar projects were undertaken elsewhere. *See* Letter from Robert Miller, EPA Region V (Dec. 12, 1995) (Ex. 14).

In 1998, EPA narrowly applied the routine maintenance exclusion when it determined that work proposed by Sunflower Electric Corp. was not routine maintenance, because it involved "redesigned" or "upgrad[ed]" components. Letter from Donald Toensing, EPA Region VII, at 2 (Aug. 28, 1998) (Ex. 15). As in prior determinations, EPA did not analyze whether similar projects were common in the industry as a whole, but instead focused on the inherent characteristics of the work at issue. *See id.*[9] In 1999, EPA again confirmed its narrow interpretation as applied to rehabilitation of deteriorated electricity generating plants. *See In re Monroe Elec. Generating Plant Proposed Operating Permit*, Petition No. 6-99-2, at 11-12, 21-22 (U.S. EPA June 11, 1999) (Monroe Determination) (Ex. 16). While concluding that the restart of a long-dormant plant most clearly amounted to a "change in the method of operation," EPA confirmed that it continued to apply the narrow interpretation of the routine maintenance exclusion set forth in the WEPCO and Casa Grande Determinations. *Id.* EPA also confirmed that it considers renovation work "as a whole," such that even otherwise minor work may be

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[9] That same year, in announcing proposed changes to other aspects of the PSD regulations, EPA again recognized that many activities will be considered "non-routine" for PSD purposes, even though sources in the electric utility industry "generally" undertake them for business reasons. *See* EPA 63 Fed. Reg. 39,857, 39,860 (July 24, 1998).

language. Judge Bullock held that Congress did not intend all physical changes to be considered "changes" under the Act, and therefore that a common-in-the-industry exclusion was necessary to "achieve the congressional intent of not subjecting existing sources to the costly requirements of installing advanced pollution control devices." *Duke Energy I*, 278 F. Supp.2d at 630-31. Aside from being undercut by *Duke Energy III*, this reasoning contradicts the plain language of the Act and basic principles of statutory construction, as recently confirmed by the Supreme Court in *Massachusetts v. EPA*, 127 S. Ct. at 1460 & n.25, and the District of Columbia Circuit in *New York II*, 443 F.3d at 884-89.[16]

The plain language of the Act's "modification" definition applies to "***any*** physical change" that increases emissions. 42 U.S.C. § 7411(a)(4) (emphasis added). Congress's specific use of the word "any" in such a CAA statutory definition generally connotes an expansive meaning, such that the definition applies to "one or some indiscriminately of whatever kind." *Massachusetts v. EPA*, 127 S. Ct. at 1460 & n.25 (internal quotations omitted); *accord New York II*, 443 F.3d at 886, 890 (construing the same statutory definition at issue here to invalidate EPA's proposed expansion of the narrow routine maintenance exclusion through the ERP, because it would have exempted large equipment replacement projects that are physical changes). These decisions make clear that any regulatory exclusions from the otherwise broad statutory requirement to apply PSD to "any physical change" that increases emissions ***must*** be interpreted narrowly.

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[16] Judge Bullock's reasoning is also unsupported by the legislative history upon which he relied. The Senate report cited as evidence of an intent to "not subject[] existing sources" to pollution control requirements, *Duke Energy I*, 278 F. Supp. 2d at 630 and n.9, actually refers to new source "construction," a term which is defined by the PSD provisions to include the "modification" of existing sources. 42 U.S.C. 7479(2)(C). Although one Senator may have intended PSD to apply only to "'major expansion projects'" at existing sources, "the language of the statute clearly did not enact such limit into law." *Alabama Power*, 636 F.2d at 400 and n.47.

EXHIBIT P TO DETROIT EDISON'S BRIEF IN SUPPORT OF MOTION TO STRIKE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA, Plaintiff, v. ILLINOIS POWER COMPANY and DYNEGY MIDWEST GENERATION, INC., Defendants.	Civil Action No. 99-833-MJR

PLAINTIFF'S REPLY TO DEFENDANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW (LIABILITY PHASE)

Plaintiff, the United States of America, respectfully submits this reply to Defendants' Proposed Findings of Fact and Conclusions of Law filed with the Court in this matter on August 15, 2003.

INTRODUCTION

Defendants' Proposed Findings of Fact ("Def. Findings") and Conclusions of Law ("Def. Conclusions"), illustrate that the vast majority of the facts concerning the nature and extent, purpose, frequency and cost of their massive reconstruction projects at the Baldwin Plant are not in dispute. In addition, Defendants' strained attempts to avoid the straightforward emissions analysis that the United States presented – an analysis consistent with the way Illinois Power itself historically analyzed the effect of the projects – must be rejected as unsupported by the weight of the evidence and the relevant regulations. Accordingly, this Court should have little difficulty concluding, like the court in *United States v. Ohio Edison Company*, 2003 WL

21910738 (S.D. Ohio Aug. 7, 2003) ("*Ohio Edison*") (Attachment 1)[1] after the liability trial in that related action, that the projects at issue were non-exempt physical changes to a major stationary source that resulted in significant net emissions increases and, as such, required compliance with the Clean Air Act ("CAA").[2]

Much of the remainder of Defendants' Proposed Findings and Conclusions centers on their contention that they lacked fair notice of Plaintiff's interpretation of EPA regulations that set forth the "routine maintenance" exemption, the methodology for calculating the emissions changes resulting from the projects at issue, and the methodology for calculating whether the air heater projects at Baldwin Units 1 and 2 constituted "capital expenditures." As detailed in Plaintiff's Proposed Findings of Fact and Conclusions of Law, and in this Reply, Defendants' fair notice arguments fall far short of establishing the constitutional violation they allege.

The Court has already received extensive briefing of the central liability issues presented in this case, not only in the parties' respective proposed findings of fact and conclusions of law, but also in the context of motions for summary judgment. Plaintiff believes that it has already largely addressed Defendants' Proposed Findings and Conclusions in Plaintiff's Proposed

[1] Plaintiff attached the *Ohio Edison* slip opinion as Attachment 1 to Plaintiff's Proposed Conclusions of Law but, for the convenience of the Court, Plaintiff is including as Attachment 1 to this Reply the Westlaw version of that opinion, which has become available in the interim.

[2] Plaintiff notes that, for the reasons stated below, the United States has withdrawn its claims regarding the Unit 3 superheater addition. *See infra*, p. 19; *see also infra* p. 50 n.28.

Findings and Conclusions, and does not wish to burden the Court with unnecessary repetition. Accordingly, Plaintiff endeavors in this Reply to address Defendants' factual and legal assertions that Plaintiff has not already addressed, and to respond to various other statements of Defendants that Plaintiff believes the Court should reject as unsupported by the record and relevant authority.

As the United States advised the Court on August 27, 2003, the Acting Administrator of the U.S. Environmental Protection Agency signed a new regulation that expands the "routine maintenance" exemption by establishing cost thresholds (among other requirements) for equipment replacement activities that would be exempt.[3] The rule does not affect the United States' claims asserted in this case, as it applies only prospectively. Preamble at 83-84 ("[n]one of today's rule revisions apply to any changes that are the subject of existing enforcement actions that the Agency has brought and none constitute a defense thereto) and 133 n.16 ("EPA today is adopting prospectively a new interpretation of the CAA . . . . ").

Although the new rule is prospective only, EPA's Preamble for the new rule reflects a change in EPA's interpretation of a provision of the Clean Air Act that must be brought to the attention of this Court. Specifically, EPA has changed its interpretation of the term "any physical change," which is part of the statutory definition of "modification" that triggers PSD and NSR requirements for facilities that were constructed before the Clean Air Act Amendments of 1977. 42 U.S.C. § 7411. *See* Preamble at 119. The position of EPA announced in the preamble is that the statute itself does not mandate the narrow construction of the regulatory exemption for "routine maintenance, repair or replacement" activities that EPA has consistently applied since

[3] Once the new rule is published in the Federal Register, the rule and the agency's legal interpretations in the preamble to the rule are subject to judicial review pursuant to Section 307(b) of the Clean Air Act, 42 U.S.C. 7607(b).

promulgation of the 1980 PSD regulations. Instead, EPA now believes that it has authority to interpret the statutory term "any physical change" as it has done in the new rule.

In adopting its new rule, EPA expressly stated that, although it now believes its new construction of the law is permissible, so, too, was its prior construction. Preamble at 16-17 ("our prior narrower and entirely case-by-case approach to the RMRR exclusions was consistent with the relevant language of the CAA and a reasonable effort to effectuate its policies."). In adopting its new equipment replacement exemption, EPA also emphasized that the new, broader exemption is a departure from the Agency's consistent, prior interpretation of its 1980 "routine maintenance" exemption. Preamble at 120 ("Before promulgation of today's rule, we interpreted the phrase "routine maintenance, repair and replacement" to be limited to the day-to-day maintenance and repair of equipment and the replacement of relatively small parts of a plant that frequently require replacement"). Accordingly, it remains the United States' position that EPA's prior interpretation of the statute and its "routine maintenance" regulation were consistent, that Defendants had fair notice of this interpretation, and this interpretation should be accorded deference and should be applied in this litigation.

EPA specifically addressed the effect of the new rule on the pending cases as follows in the preamble to the rule:

> We have taken positions in numerous court filings concerning the proper interpretation and usage of key statutory terms, such as 'physical change' and 'any physical change.' These positions were based on permissible constructions of the statute of which the regulated community had fair notice, and correctly reflect the Agency's reasonable accommodation of the Clean Air Act's compelling policies in light of its experience at the time it adopted

> the RMRR exclusion in 1980. The Agency has sought, and has obtained, deference for its interpretations, and, notwithstanding today's adoption of a revised interpretation of the statute and an expansion of the RMRR exclusion, the Agency shall continue to seek deference for those prior interpretations in ongoing enforcement litigation.

Preamble at 130-31, n.14.

However, in light of EPA's change of position as to its interpretation of the Clean Air Act, the United States does not rely on any prior statements it has made to this Court that a very narrow construction of the "routine maintenance" exemption is required by the Clean Air Act itself. Instead, the United States will continue to rely on EPA's narrow interpretation of its prior "routine maintenance" exception, which remains applicable to this action. *See* Pl. Conclusions ¶¶ 45-56.

ARGUMENT

I. THE BALDWIN PROJECTS ARE NOT EXEMPT AS ROUTINE MAINTENANCE

As noted, the facts concerning the Baldwin projects are largely undisputed. Plaintiff herein responds to a number of Defendants' assertions that we regard as incorrect relating to whether the projects qualify for the exemption for "routine maintenance, repair, and replacement" (hereinafter "routine maintenance").

A. Routine Maintenance Is Not Measured by Prevalence of an Activity in the Industry, Nor Is the Burden on EPA To Show the Inapplicability of the Exemption

In their proposed findings, Defendants have argued that component replacement projects similar to those at issue in this case are prevalent in the coal-fired electric utility industry and should thus be considered routine. Def. Findings ¶¶ 339-52; Def. Conclusions ¶ 129, 131c.

EXHIBIT Q TO DETROIT EDISON'S BRIEF IN SUPPORT OF MOTION TO STRIKE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA,	
Plaintiff,	
v.	**CIVIL ACTION**
	No. 09-100-RET-CN
LOUISIANA GENERATING, LLC	
Defendant.	

JOINT STATUS REPORT

A. JURISDICTION:

Plaintiff's Position: Plaintiff contends that this Court has jurisdiction of the subject matter of this action pursuant to Sections 113(b) and 167 of the Clean Air Act ("Act"), 42 U.S.C. §§ 7413(b) and 7477, and pursuant to 28 U.S.C. §§ 1331, 1345, and 1355. The plaintiff contends that this Court has subject matter jurisdiction over this action not only under Section 113(b), but also under Section 167 of the Act. 42 U.S.C. §§ 7413(b) and 7477. Under Section 165 of the Act, to which Section 167 of the Act refers, no major emitting facility on which construction is commenced, may be constructed or modified unless a permit has been issued "*setting forth emission limitations* for such facility which confirm to the requirements of this part." 42 U.S.C. § 7475(a). Compliance with emission limitations is as integral to the PSD program as preconstruction analysis and review. Facilities undergoing modification must obtain a PSD permit before construction and, following construction, operate in accordance with the terms of

that permit. While the major modifications at issue were constructed more than nine years before the filing of plaintiff's Complaint, the defendant assumed legal and contractual responsibility for and has continued to operate and receive the benefit of these modifications for the last nine years.

Defendant's Position: Louisiana Generating LLC ("Louisiana Generating") (or "defendant") does not contest that this Court has jurisdiction of the subject matter of this action pursuant to Section 113(b) of the Act, 42 U.S.C. §§ 7413(b), and pursuant to 28 U.S.C. §§ 1331, 1345, and 1355. However, defendant contends that § 167 of the Act, 42 U.S.C. § 7477, is inapplicable to this action because it authorizes enforcement measures only "as necessary to *prevent the construction or modification* of a major emitting facility which does not conform to the requirements of" the Prevention of Significant Deterioration ("PSD") provisions of the Act. (Emphasis added.) Section 167 cannot apply in this matter because the alleged modifications on which plaintiff bases its claims were constructed more than nine years prior to the filing of plaintiffs' Complaint.

B. BRIEF EXPLANATION OF THE CASE:

1. Plaintiff's claims: This action is brought against the defendant pursuant to Sections 113(b) and 167 of the Act, 42 U.S.C. § 7413(b) and 7477, for injunctive relief and the assessment of civil penalties related to the Big Cajun II electric generating station ("BCII") for violations of the PSD provisions of the Act, 42 U.S.C. §§ 7470-92; the federally approved Louisiana PSD regulations of the Louisiana State Implementation Plan ("SIP"); Title V of the Act, 42 U.S.C. §§ 7661-7661f, and the federally approved Louisiana Title V program, or any rule or permit issued thereunder. These applicable federal and State statutes and regulations

prohibit the operation of BCII without the use of Best Available Control technology ("BACT") to reduce harmful air pollution after a major modification has been performed at the facility.

2. Defendant's claims: Louisiana Generating contends that Plaintiff's claims fail as a matter of law and that Plaintiff cannot meet its burden of proof with respect to the violations alleged in the Complaint. Louisiana Generating is not alleging any claims against Plaintiff at this time.

C. PENDING MOTIONS:

1. Defendant's Motion for Stay: On April 27, 2009, Louisiana Generating filed a Motion for Stay of Proceedings Pending Resolution of Certain Bankruptcy Court Actions (Dkt. 15). The Motion for Stay requests that the District Court stay all discovery and other proceedings in this action to allow resolution of certain actions in the bankruptcy court proceeding for Cajun Electric Power Cooperative, Inc., the prior owner of the Big Cajun II, Units 1 and 2, relating to the issues in this case. The defendant filed a Reply to the United States' Opposition on June 3, 2009 (Dkt. 24).

Plaintiff's Opposition : On May 4, 2009, the United States filed an Opposition to the defendant's Motion for Stay of Proceedings (Dkt. 18). In its Opposition, the United States argues that defendant's Motion for a Stay should be denied because a stay of this action would be contrary to the first-filed rule and will not facilitate this Court's evaluation and resolution of this action. Regardless of the forum in which the issue in the bankruptcy court is litigated, any resolution of that issue will not resolve the liability or remedial claims present here. The United States anticipates filing a Sur-Reply on or before June 15, 2009. The defendant has stated that it will not oppose the United States' request for leave to file a Sur-Reply. In addition, on June 3,

2009, the United States filed a Motion to Intervene in the adversary proceeding filed by the defendant in the bankruptcy court. The United States anticipates filing a motion to withdraw the reference of the adversary proceeding from the bankruptcy court to the District Court by June 15, 2009.

2. Defendant's Motion to Bifurcate: On or about June 9, 2009, Louisiana Generating plans to file a Motion to Bifurcate Proceedings into Liability and Remedy Phases. Louisiana Generating contends that this matter should be bifurcated into separate liability and remedy phases for purposes of both discovery and trial, with liability discovery and trial occurring first and, if necessary, remedy discovery and trial occurring thereafter. Louisiana Generating contends that bifurcation is appropriate here because (a) it could avoid time-consuming and expensive discovery on remedy issues that may prove unnecessary after the liability trial, (b) it has been implemented in multiple prior cases addressing similar claims, and (c) it will not cause undue prejudice to the United States.

Plaintiff's Opposition : Plaintiff opposes this Motion and intends to file a response by June 15, 2009. The United States contends that this proceeding should not be bifurcated because (a) bifurcation will not serve the interests of judicial convenience and economy; and bifurcation will prejudice the United States because the requested pollution controls should be installed as soon as practicable given the substantial harm to public health and the environment occurring as a result of the air emissions from BCII.

D. ISSUES: See Attachment A.

E. DAMAGES:

1. Plaintiff's calculation of damages: As provided in Section 113(b) of the Act, 42 U.S.C. § 7413(b), and Section 167 of the Act, 42 U.S.C. § 7477, the violations set forth in the Complaint subject the defendant to civil penalties of up to $27,500 per day for each such violation occurring between January 31, 1997 and March 15, 2004; $32,500 for each such violation occurring between March 15, 2004 and January 12, 2009; and $37,500 for each such violation occurring after January 12, 2009, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended.

Injunctive relief: As provided in Section 113(b) of the Act, 42 U.S.C. § 7413(b), and Section 167 of the Act, 42 U.S.C. § 7477, the defendant should be enjoined from operating Units 1 and 2 of the Big Cajun II Power Plant, except in accordance with the Clean Air Act and any applicable regulatory requirements; required to install and operate, as appropriate, Best Available Control Technology ("BACT") at Units 1 and 2 of the Big Cajun Power Plant, for each pollutant subject to regulation under the Clean Air Act; required to apply for permits that are in conformity with the requirements of the PSD and the Louisiana Title V Operating Permits program; required to conduct audits of its operations to determine if any additional modifications have occurred which would require it to meet the requirements of PSD and report the results of these audits to the United States; required to surrender emission allowances or credits to offset and mitigate the illegal emissions under the PSD and the Louisiana Title V Operating Permits program; and required to take other appropriate actions to remedy, mitigate, and offset the harm to public health and the environment caused by the violations of the Clean Air Act.

2. Defendant's calculation of offset and/or plaintiff's damages:

Louisiana Generating contends that all of Plaintiff's claims lack merit and that Plaintiff cannot establish a right to any civil penalties or injunctive relief. Louisiana Generating further contends that Plaintiff cannot recover civil penalties for alleged PSD violations because those claims are barred by the five-year federal statute of limitations in 28 U.S.C. § 2462.

Louisiana Generating is not asserting offset damages against Plaintiff as of the time of the submission of this Joint Status Report.

3. Counter claimant/cross claimant/third party's calculation of damages: None

F. SERVICE: None

G. DISCOVERY:

The parties have two fundamental disagreements regarding the conduct of discovery in this case. First, Plaintiff contends that discovery should proceed concurrently on both liability and remedy issues. Louisiana Generating contends that the proceeding should be bifurcated into separate liability and remedy phases, with discovery and trial on the liability phase to be completed before beginning discovery on the remedy phase, if necessary. Second, Plaintiff contends that discovery in this matter should not be stayed pending the Court's resolution of Louisiana Generating's Motion for a Stay and Motion to Bifurcate Proceedings. Louisiana Generating contends that all discovery in this matter (except for initial disclosures on liability issues pursuant to FRCP 26(a)(1)) should be stayed pending the Court's resolution of Louisiana Generating's Motion for Stay and Motion to Bifurcate Proceedings described in Section C., above. These disagreements are reflected in the remaining sections of this Status Report and in the attached Discovery Plan. For each disputed issue, Plaintiff and Defendant have stated separately their respective positions and recommendations.

1. The initial disclosures on issues relating to liability required under FRCP 26(a)(1) will be completed by June 19, 2009. The parties have stipulated that disclosures under FRCP 26(a)(1) regarding remedy issues need not be exchanged until the earlier of (a) 45 days after this Court issues an Order directing that the case shall not be bifurcated into liability and remedy phases for purposes of discovery; or (b) if the Court determines the case shall be bifurcated, at such time during the remedy phase as required under FRCP 26(a)(1) or by order of the Court.

2. The parties agree that discovery cannot begin under FRCP 26(d)(1) until June 5, 2009.

The United States contends that in light of the absence of compelling circumstances, this action should not be stayed, and this Court, as the court first presented with the controversy, should decide the issues raised by the parties. The requested stay will not conserve judicial and the parties' resources since an adjudication of the contractual liability issue in this Court will conserve more resources than adjudication in multiple forums. In addition, such a stay would be prejudicial to the United States because it is likely to further delay the ultimate resolution of this action, extending the exposure of the public to harmful air pollutants. The United States plans to serve Interrogatories and Requests for Production of Documents on the defendant before June 18, 2009. The defendant's past responses to EPA's administrative requests for information have provided the United States with much less information than the United States is entitled to under Rules 26-37 of the Federal Rules of Civil Procedure.

Louisiana Generating contends that efficient case administration and judicial economy will be served by staying all discovery (other than initial disclosures regarding liability issues as set forth in Section G.1., above) pending the Court's resolution of Louisiana Generating's

Motion for Stay of Proceedings Pending Resolution of Certain Bankruptcy Court Actions. Louisiana Generating further contends that any and all discovery regarding remedy issues should be stayed pending the Court's resolution of Louisiana Generating's Motion to Bifurcate Proceedings, and deferred until the remedy phase, if necessary. If Plaintiff serves discovery on Louisiana Generating prior to the June 18, 2009 scheduling conference, Louisiana Generating may move for a protective order pursuant to FRCP 26(c) requesting that the Court issue an order that Plaintiff is prohibited from seeking discovery against Louisiana Generating until the Court has resolved the parties' disputes regarding the timing of discovery. Given that the United States has been aware of its claims against Louisiana Generating since at least February 2005, and already has been provided access to thousands of boxes of information by Louisiana Generating in response to EPA's administrative requests for information, the United States will not suffer any prejudice from implementation of a limited stay of discovery consistent with the above Motions.

As described in detail in the parties' Discovery Plan (Attachment B), the parties anticipate serving interrogatories under FRCP 33, requests for production of documents and for inspection under FRCP 34, and requests for admission under FRCP 36.

3. The parties have entered into and ask the Court to approve and sign the following protective orders and other limitations on discovery:

(a) Stipulation Regarding Preservation of Certain Electronically Stored Information and Privileged Materials (Attachment C);

(b) Stipulated Protective Order Regarding Confidential Information and Documents (Attachment D).

4. Discovery from Experts: The parties anticipate that their experts will offer expert testimony in the following areas:

Plaintiff(s): (a) The modifications alleged in the Complaint at Big Cajun II, Units 1 and 2, did not constitute routine maintenance, replacement or repair under 40 C.F.R. § 52.21(b)(2) and LAC 33:III.509.B; (b) Significant net increases in air emissions under 40 C.F.R. § 52.21(b)(2), (b)(3), and (b)(23)and LAC 33:III.509.B resulted from the modifications alleged in the Complaint at Big Cajun II, Units 1 and 2; (c) The defendant is required to install specific BACT at Big Cajun II, Units 1 and 2, in accordance with 40 C.F.R. § 52.21(b)(12) and (J) and LAC 33:III.509.B and (J); and (d) The appropriate actions to remedy, mitigate, and offset the harm to public health and the environment caused by the defendant's violations of the Act. This discussion of potential expert testimony is a general summary only; the United States reserves the right to modify or clarify these subject areas as the case progresses.

Defendant(s):

Expert Testimony in Liability Phase: (a) The projects at Big Cajun II, Units 1 and 2, identified in the Complaint as the basis for Plaintiff's claims constituted routine maintenance, repair or replacement or were otherwise outside of the scope of activities that require compliance with PSD obligations; (b) The projects identified by Plaintiff did not result in significant net increases in emissions of regulated pollutants under the applicable PSD regulations.

Expert Testimony in Remedy Phase (if necessary): (a) The absence of specific harm that can be traced to any adjudicated violations at Big Cajun II, Units 1 and 2; (b) The nature, scope and cost of potential relief available for any adjudicated violations.

This discussion of potential expert testimony is a general summary only; Louisiana Generating reserves the right to modify or clarify these subject areas as the case progresses.

H. PROPOSED SCHEDULING ORDER:

As explained above, the parties disagree regarding whether discovery and pre-trial proceedings in this action should be undertaken in a single proceeding combining liability and remedy discovery, or in a bifurcated proceeding with liability discovery and trial occurring first. Louisiana Generating has included two separate dates for each scheduling milestone below. The first date (labeled "Bifurcation (liability only)") is the date proposed by Louisiana Generating for completion of the milestone if the proceeding has been bifurcated and the dates apply only to the liability phase. The second date (labeled "No Bifurcation (combined proceeding)") is the date proposed by Louisiana Generating for completion of the milestone if the proceeding has not been bifurcated and the dates apply to both liability and remedy milestones.

1. Recommended deadlines for amending the complaint, or adding new parties, claim, counterclaims or cross claims:

Plaintiff's Recommendation: February 15, 2010.

Defendant's Recommendation:

Bifurcation (liability only): February 15, 2010

No Bifurcation (combined proceeding): February 15, 2010

2. Recommended deadlines for completion of fact discovery:

A. Initial liability disclosures required by FRCP 26(a)(1): June 19, 2009

B. Filing all discovery motions and completing all discovery except experts:

Plaintiff's Recommendation: September 15, 2010

Defendant's Recommendation:

Bifurcation (liability only): September 15, 2010

No Bifurcation (combined proceeding): May 13, 2011

3. Disclosure of identities and resumes of expert witnesses:

Plaintiff's Recommendation:

Plaintiff(s): June 1, 2010

Defendant(s): July 1, 2010

Defendant's Recommendation:

Bifurcation (liability only):

Plaintiff(s): June 1, 2010

Defendant(s): July 15, 2010

No Bifurcation (combined proceeding):

Plaintiff(s): February 1, 2011

Defendant(s): March 18, 2011

4. Exchange of expert reports:

Plaintiff's Recommendation:

Plaintiff(s): Initial Reports - June 1, 2010

Defendant(s): Initial Reports - July 1, 2010.

Defendant's Recommendation:

Bifurcation (liability only):

Plaintiff(s): June 1, 2010

Defendant(s): July 15, 2010

No Bifurcation (combined proceeding):

Plaintiff(s): February 1, 2011

Defendant(s): March 18, 2011

Rebuttal Reports – Within 30 days of service of the report being rebutted.

5. Completion of discovery from experts:

Plaintiff's Recommendation: October 15, 2010

Defendant's Recommendation:

Bifurcation (liability only): November 5, 2010

No Bifurcation (combined proceeding): June 30, 2011

6. Filing dispositive motions:

Plaintiff's Recommendation: November 8, 2010

Defendant's Recommendation:

Bifurcation (liability only): December 14, 2010

No Bifurcation (combined proceeding): August 19, 2011

7. Responses to dispositive motions:

Plaintiff's Recommendation: December 9, 2010.

Defendant's Recommendation:

Bifurcation (liability only): January 21, 2011

No Bifurcation (combined proceeding): September 30, 2011

8. Replies to dispositive motions:

Plaintiff's Recommendation: January 10, 2011.

Defendant's Recommendation:

Bifurcation (liability only): February 23, 2011

No Bifurcation (combined proceeding): November 1, 2011

9. A final list of witnesses and exhibits under Rule 26(a)(3):

Plaintiff's Recommendation: March 1, 2011

Defendant's Recommendation:

Bifurcation (liability only): April 22, 2011

No Bifurcation (combined proceeding): January 13, 2012

10. Objections to the final lists of witnesses and exhibits:

Plaintiff's Recommendation: March 15, 2011.

Defendant's Recommendation:

Bifurcation (liability only): May 10, 2011

No Bifurcation (combined proceeding): February 15, 2012

I. TRIAL:

1. At the time set forth in FRCP 38, Louisiana Generating intends to make a demand for trial by jury of all liability issues so triable.

2. Estimate the number of days that trial will require:

Plaintiff's Response: Two weeks.

Defendant's Response: Defendant is requesting that the action be bifurcated into separate liability and remedy phases for both discovery and trial and intends to request a jury trial for all liability issues so triable. Defendant estimates the liability trial will require one week and the remedy trial, if necessary, will require 8-10 days.

J. OTHER MATTERS:

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that the foregoing was filed electronically with the Clerk of Court using the CM/ECF system. I also certify that I have mailed copies of the foregoing by United States mail, postage prepaid, to the following party:

William Bumpers
Kent Mayo
Baker Botts, LLP
The Warner
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2400

s/ Richard M. Gladstein
Richard M. Gladstein
Environmental Enforcement Section

ATTACHMENT A

PLAINTIFF'S IDENTIFICATION OF ISSUES

(1) Whether the replacements in 1998 and 1999 of major portions of the primary and high-temperature boiler reheaters at the Big Cajun II Power Plant, Unit Nos. 1 and 2, constituted major modifications, requiring a permit and the application of Best Available Control Technology ("BACT") under the Act, including 42 U.S.C. §§ 7479(2), 7475; the relevant federal PSD regulations including 40 C.F.R. § 52.21(a), (b) and (j); and the Louisiana SIP, including LAC 33:111.509.

(2) Whether the defendant was required to obtain a permit and apply BACT before operating the Big Cajun II Power Plant, Unit Nos. 1 and 2, under the Act, including 42 U.S.C. § 7475; the relevant federal PSD regulations including 40 C.F.R. § 52.21(a) and (j); and the Louisiana Operating Permits Program, including LAC 33:111.501.C?

(3) Whether, even apart from the obligation to obtain a permit requiring the application of BACT, the defendant assumed such environmental liabilities under the 1999 Fifth Amended and Restated Asset Purchase and Reorganization Agreement between the defendant and Ralph R. Mabey, as Chapter 11 trustee of Cajun Electric?

(4) Whether the defendant failed to submit a complete application for and obtain an Title V permit, that includes all applicable requirements, before the operation of Big Cajun II, Unit Nos. 1 and 2,, in violation of the of the Act, 42 U.S.C. §§ 7661a(a), 7661b(c), and 7661c(a); 40 C.F.R. §§ 70.5-70.6, and the Louisiana Title V Operating Permit Program, including LAC 33:III.501.C, 507 and 517?

(5) Whether the defendant's failure to install BACT under the Act, including 42 U.S.C. §§ 7479(2), 7475; the relevant federal PSD regulations including 42 C.F.R. § 52.21(a), (b) and (j); the Louisiana SIP, including LAC 33:111.509; or the Louisiana General Operating Permits Program, resulted in harm to public health and the environment.

This discussion of issues is a general summary only; the United States reserves the right to modify or clarify the specific issues before the Court as the case progresses.

DEFENDANT'S IDENTIFICATION OF LIABILITY ISSUES

(1) Whether Louisiana Generating may be subject to liability under the PSD program based solely on alleged modifications performed by Cajun Electric Power Cooperative, Inc., the prior owner of Big Cajun II, Units 1 and 2.

(2) Whether Plaintiff's claims for civil penalties under the PSD program are barred by the 5-year federal statute of limitations in 28 U.S.C. § 2462.

(3) Whether Louisiana Generating may be liable under the federal and Louisiana Title V operating permit programs based on alleged deficiencies in the current Title V operating permit for Big Cajun II, which was issued by the Louisiana Department of Environmental Quality and approved by Plaintiff with knowledge of the alleged violations contained in Plaintiff's Complaint.

(4) Whether the projects identified in the Complaint as the basis of Plaintiff's claims constituted "major modifications" under the PSD program and created obligations to comply with PSD requirements.

DEFENDANT'S IDENTIFICATION OF REMEDY ISSUES (IF NECESSARY)

(1) Whether the relief sought by Plaintiff for any adjudicated violations is within the scope of relief authorized under the Clean Air Act and within the jurisdiction of this Court.

This discussion of issues is a general summary only; Louisiana Generating reserves the right to modify or clarify the specific issues before the Court as the case progresses.

ATTACHMENT B

DISCOVERY PLAN

The parties jointly propose to the Court the following Discovery Plan.

A. Discovery

1. Subjects - Discovery will be needed on the following subjects:

   a. The Plaintiff's claims against the Defendant; and

   b. The Defendant's defenses.

2. Fact Depositions

Plaintiff's Proposal: There will be a maximum of 35 fact witness depositions (including depositions pursuant to FRCP 30(b)(6)) by Plaintiff and 35 fact witness depositions (including depositions pursuant to FRCP 30(b)(6)) by Defendant.

Defendant's Proposal:

Bifurcation (liability only): Maximum of 20 fact witness depositions (including depositions pursuant to FRCP 30(b)(6)) by Plaintiff and 20 fact witness depositions (including depositions pursuant to FRCP 30(b)(6)) by Defendant.

No Bifurcation (combined proceeding): Maximum of 30 fact witness depositions (including depositions pursuant to FRCP 30(b)(6)) by Plaintiff and 30 fact witness depositions (including depositions pursuant to FRCP 30(b)(6)) by Defendant.

The parties may mutually agree to take more depositions, if necessary and appropriate. The parties will make good faith efforts to confer prior to scheduling depositions and to adhere to any schedules agreed upon by counsel. The parties will adhere to the following procedures:

a. All officers and employees of parties, who are properly subject to discovery, will be produced for deposition upon notice of deposition without further process;

b. Each party will use reasonable efforts to make former officers and employees, who are properly subject to discovery, available for depositions upon notice of deposition without subpoena or further process;

c. The time between service of a deposition notice and the date set for the deposition by that notice must be at least ten business days unless shortened by agreement of the parties or order of the Court; and

d. Each deposition of a fact witness shall be limited to one day of 7 hours, excluding breaks, unless extended by agreement of parties or order of the Court.

e. The parties recognize that depositions conducted pursuant to FRCP 30(b)(6), depending on circumstances including the number of topics and deponents, may require additional time for completion and agree to address the time limitations for each such deposition on a case-by-case basis.

4. Interrogatories

Plaintiff's Proposal: There will be a maximum of 200 Interrogatories by each party to any other party.

Defendant's Proposal:

Bifurcation (liability only): There will be a maximum of 100 interrogatories by each party to any other party.

No Bifurcation (combined proceeding): There will be a maximum of 200 interrogatories by each party to any other party.

An interrogatory containing subparts directed at eliciting details concerning a common theme shall be considered a single question. For example, a question asking about communications of a particular type will be treated as a single interrogatory even though it requests that the time, place, persons present, and contents be stated separately for each such communication. Parties may not evade the limitation on interrogatories by joining as subparts questions that seek information about discrete separate subjects. Responses shall be made as required by FRCP 33, unless extended by agreement of the parties or order of the Court.

5. Document Production Requests

Plaintiff's Proposal: There will be a maximum of 250 requests for production of documents by each party to any other party.

Defendant's Proposal:

Bifurcation (liability only): There will be a maximum of 100 requests for production of documents by each party to any other party.

No Bifurcation (combined proceeding): There will be a maximum of 200 requests for production of documents by each party to any other party.

Responses to document production requests shall be made as required by FRCP 34, unless extended by agreement of the parties or order of the Court. The parties shall produce all documents responsive to a request for production as follows:

a. Unless other arrangements are made consistent with FRCP 34, the party upon whom the request is served shall provide copies of documents responsive to the

request to the other party. Unless otherwise agreed, one set of copies shall be provided.[1] However, either party may request to inspect the originals of any document produced or, in the case of electronically stored information, may request to inspect or receive the electronically stored information in native format. The party providing the documents responsive to the request shall assume all copying fees;

b. To the extent that electronically stored information is the subject of discovery in this action, the Parties agree to meet and confer and to agree upon the form or forms of production of that information; and

c. Except as agreed upon in the Stipulation Regarding Preservation of Certain Electronically Stored Information and Privileged Materials (Attachment A), all parties are ordered to preserve all records in their possession that are or may be material to this litigation consistent with applicable law until the conclusion of this litigation or until otherwise ordered by this Court.

6. Requests for Admissions

Plaintiff's Proposal: There will be a maximum of 250 requests for admissions by each party to any other party.

Defendant's Proposal:

Bifurcation (liability only): There will be a maximum of 100 requests for admissions by each party to any other party.

[1] Unless otherwise agreed, the parties shall provide one set of copies on CD-ROM, with each CD-ROM containing the following: images in single page Tiff format; a text file containing start Bates/end Bates for each document; and a cross reference file in Opticon log file format containing the start Bates, CD volume, and the full path to the image (assumes E as CD drive), with document breaks indicated by at "Y" at the end of the record.

No Bifurcation (combined proceeding): There will be a maximum of 200 requests for admissions by each party to any other party.

Responses to requests for admissions shall be made as required by FRCP 36, unless extended by agreement of the parties or order of the Court.

7. Effect of Inadvertent Production of Documents - The inadvertent production of documents in connection with the litigation before this Court shall not waive any privilege that would otherwise attach to the documents produced, consistent with Federal Rule of Evidence 502. The following procedure shall apply to any such claim of inadvertent production:

a. Upon learning of the inadvertent production, the producing party shall promptly give all counsel of record notice of the inadvertent production. The notice shall identify the document, the portions of the document that were inadvertently produced, and the first date the document was produced. If the party that produced a document claims that only a portion of the document was inadvertently produced, the party shall provide with the notice of inadvertent production a new copy of the document with the allegedly privileged portions redacted.

b. Upon receiving notice of inadvertent production, or upon determining that a document received is known to be privileged, the receiving party must promptly return, sequester or destroy the specified information and any copies it has, and shall destroy any notes that reproduce, copy or otherwise disclose the substance of the privileged information. The receiving party may not use or disclose the information until the claim is resolved. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve and prevent further use or distribution of such information until the claim is resolved.

c. A party receiving documents produced by another party is under a good-faith obligation to promptly alert the producing party if a document appears on its face or in light of facts known to the receiving party to be privileged.

d. To the extent that either party obtains any information, documents, or communications through inadvertent disclosure, such information, documents and communications shall not be filed or presented for admission into evidence or sought in discovery by that party in *United States v. Louisiana Generating LLC,* Civil Action No. 09-100-RET-CN.

e. In the event the receiving party disputes the assertion of privilege, the parties shall meet and confer and the requesting party shall either: (a) return the material to the producing party for proper designation; or (b) present the information to the Court under seal for a determination as to whether the material is protected from disclosure.

C. Discovery Stipulations

1. The parties agree to be bound by the Stipulation Regarding Preservation of Certain Electronically Stored Information and Privileged Materials (Attachment A).

2. The parties agree that there is no obligation to search for and produce electronically stored information in response to the parties' general discovery requests, nor to identify on a privilege log electronically stored information that may be responsive to such requests. However, the parties shall be obligated to search for and produce electronically stored information in response to reasonable requests for production that expressly seek electronically stored information, and to identify on a privilege log any electronic documents sought to be withheld on privilege grounds in response to such reasonable requests for production

3. Privileged Materials Located in the Offices of Counsel for the Parties. The parties agree that, in response to general discovery requests, the parties need not search for and produce, nor create a privilege log for, any privileged material which is located in the offices of counsel for the parties at the Department of Justice, EPA, Louisiana Generating LLC, Baker Botts LLP, or Jones, Walker,Waechter, Poitevent, Carrere & Denegre, LLP. However, the parties shall be obligated to search for documents located in the offices of counsel for the Parties at EPA and Louisiana Generating LLC in response to reasonable requests for production that expressly seek documents from those offices, and to identify on a privilege log any documents sought to be withheld on privilege grounds in response to such reasonable requests for production.

D. Expert Discovery

Notwithstanding any provision in the FRCP to the contrary, the following terms apply to both the production of documents under Rule 26(a)(2)(B), Rule 34, and Rule 45, and to the timing and scope of expert deposition testimony.

1. At the time of submission of the expert reports, the parties will identify "the data or other information considered by the witness in forming his or her opinions," in accordance with FRCP 26(a)(2). For the purpose of this Discovery Plan, except as noted below, "considered documents" shall be those documents that have been received and read or reviewed during the preparation of his or her expert report, furnished to the expert to be used in forming opinions (other than those determined to be not relevant after a cursory review), or taken into account by the expert during the preparation of his or his expert report, regardless of whether the expert actually relies upon the document in forming his or her opinion. "Considered documents"

specifically include the final versions of an expert's spreadsheets, tables or other quantitative analyses prepared in support of the final report.

Such "data or other information" may be subject to questioning during expert depositions. The party submitting expert reports will provide copies of all "considered" documents to the other party within 7 days of submitting the corresponding expert report(s). Where such "data or other information" was produced by either party in this litigation (or to EPA administratively), identification by Bates number will be sufficient. The party submitting expert reports shall identify information that is publicly available, but is required to produce such documents only if it is more burdensome for the party receiving the report to obtain them than it would be for the party producing the report, and upon a specific request. Such production shall take place within ten days of the request.

2. Notwithstanding paragraph 1, all drafts and pre-final versions of the expert's report shall be outside the scope of expert discovery. "Drafts and pre-final versions" shall be interpreted to encompass only the following documents:

a. Draft or preliminary spreadsheets, tables, or other quantitative analyses, outlines, notes, or preliminary drafts of the expert's report that were created by the expert (or persons employed by or otherwise working for the expert) as part of preparing his/her report;

b. All communications between an expert and an attorney or other representative of a party, except data provided by an attorney or other representative of a party that is covered under Section III.D.2. above; and

c. Drafts and pre-final versions exchanged between the expert (or persons employed by or otherwise working for the expert) and another testifying expert. However, if one testifying expert ("Expert A") relies on a document authored by another testifying expert ("Expert B"), the version of the document relied on is subject to discovery (from Expert A), notwithstanding its status as a "draft" to the authoring expert (Expert B), unless all information considered by Expert A is contained in Expert B's final report.

3. To the extent documents or other information (a) relate to work performed in one of the other suits in the Clean Air Act New Source Review cases against electric utilities since November 3, 1999), and (b) were created by either (i) a testifying expert designated in the above-captioned matter or (ii) a testifying expert designated in any of the other suits filed as part of the Utility Enforcement Initiative, such documents or other information are outside the scope of expert discovery, unless such documents fall into the category described in paragraph 1 and are not "drafts or pre-final versions" as defined in paragraph 2. Notwithstanding the foregoing, final expert reports and related exhibits, depositions and related exhibits, affidavits, trial testimony and related exhibits generated by a testifying expert, irrespective of the action in connection with which it was created, shall be discoverable subject to claims of confidential business information.

4. With regard to expert depositions:

a. There will be no formal numeric limitation on the number of expert depositions;

b. Each party will pay for the time that party's own expert spends in deposition; and

c. The 7 hour, one-day limit imposed by revised Rule 30(d)(2) shall not apply to expert depositions. Except as otherwise set forth in this subparagraph, the deposition of an expert shall be limited to 14 hours in the case in which it is taken. Without agreement of counsel, no deposition of an expert shall last more than 7 hours in any calendar day excluding breaks. If a party anticipates either before or during a deposition of an expert that an expert's deposition will take longer than 14 hours, the parties shall discuss the need for an extension. If the parties in this case cannot reach agreement regarding an extension, the party taking the deposition may seek relief from the Court and bears the burden of demonstrating that 14 hours is inadequate.

5. To the extent that either party obtains any information, documents, or communications, described herein as outside the scope of expert discovery, through inadvertent disclosure, such disclosure shall be addressed in accordance with Section III.B.7. above.

6. The following examples may be used as a guide for interpreting the scope of expert discovery permissible by the terms of this Discovery Plan:

a. A testifying expert relies upon data supplied by a non-testifying consultant. The party deposing the testifying expert may ask questions about the data supplied by the non-testifying consultant;

b. A testifying expert discusses the organization of his expert report with counsel. These communications with counsel need not be disclosed; and

c. Counsel supplies the testifying expert with data that the expert relies upon.

The testifying expert may be questioned about the reliability of the data and the role the data plays in the expert's opinion.

EXHIBIT R TO DETROIT EDISON'S BRIEF IN SUPPORT OF MOTION TO STRIKE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
LEXINGTON DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. KENTUCKY UTILITIES COMPANY, Defendant.	Civil Action No. 5:07-CV-75

JOINT STATUS REPORT AND DISCOVERY PLAN

I. FED.R.CIV.P. 26 MEETING

Pursuant to Fed.R.Civ.P 26(f), a meeting was held on July 18, 2007, in Washington, D.C., between counsel for Plaintiff United States of America and Defendant Kentucky Utilities Company (collectively "the parties").

A. Appearing on behalf of Plaintiff were:

Jeffrey Prieto, US Department of Justice
John Sither, US Department of Justice
Andrew Hanson, US Environmental Protection Agency
Jennifer Lewis, US Environmental Protection Agency (by telephone)

B. Appearing on behalf of Defendant were:

Kent Mayo, Baker Botts LLP
Megan Heuberger, Baker Botts LLP
John C. Bender, Greenebaum Doll & McDonald PLLC (by telephone)
Robert Ehrler, E.ON U.S. LLC (by telephone)

II. PRE-DISCOVERY DISCLOSURES

The parties exchanged the information required by Fed.R.Civ.P. 26(a)(1) at the July 18, 2007 meeting.

III. DISCOVERY PLAN

The parties jointly propose to the Court the following Discovery Plan.

A. Bifurcation of Liability and Remedy

Both discovery and trial should be bifurcated between liability and remedy phases with liability discovery and trial occurring first. The parties propose that no schedule be entered at this time with respect to remedy discovery or trial.

B. Liability Discovery

1. Subjects - Liability discovery will be needed on the following subjects:

   a. The Plaintiff's claims against the Defendant; and

   b. The Defendant's defenses.

2. Timing - All liability discovery will commence in time to be completed by September 30, 2008.

3. Fact Depositions - There will be a maximum of 20 fact witness depositions (including depositions pursuant to Fed. R. Civ. P. 30(b)(6)) by Plaintiff and 20 fact witness depositions (including depositions pursuant to Fed. R. Civ. P. 30(b)(6)) by Defendant. The parties may mutually agree to take more depositions, if necessary and appropriate. The parties will make good faith efforts to confer prior to scheduling depositions and to adhere to any schedules agreed upon by counsel. The parties will adhere to the following procedures:

a. All officers and employees of parties, who are properly subject to discovery, will be produced for deposition upon notice of deposition without further process;

b. Each party will use reasonable efforts to make former officers and employees, who are properly subject to discovery, available for depositions upon notice of deposition without subpoena or further process;

c. The time between service of a deposition notice and the date set for the deposition by that notice must be at least ten business days unless shortened by agreement of the parties or order of the Court; and

d. Each deposition of a fact witness shall be limited to one day of 7 hours, excluding breaks, unless extended by agreement of parties or order of the Court.

e. The parties recognize that depositions conducted pursuant to Fed. R. Civ. P. 30(b)(6), depending on circumstances including the number of topics and deponents, may require additional time for completion and agree to address the time limitations for each such deposition on a case-by-case basis.

4. Interrogatories - There will be a maximum of 100 Interrogatories by each party to any other party. An interrogatory containing subparts directed at eliciting details concerning a common theme shall be considered a single question. For example, a question asking about communications of a particular type will be treated as a single interrogatory even though it requests that the time, place, persons present, and contents be stated separately for each such communication. Parties may not evade the limitation on interrogatories by joining as

subparts questions that seek information about discrete separate subjects. Responses shall be due 30 days after receipt of the requests, unless extended by agreement of the parties or order of the Court.

5. Document Production Requests - There will be a maximum of 100 requests for production of documents by each party to any other party. Documents responsive to document production requests shall be produced no later than 30 days after receipt of the document production requests, unless extended by agreement of the parties or order of the Court. The parties shall produce all documents responsive to a request for production as follows:

a. Unless other arrangements are made or it is not practicable, the party upon whom the request is served shall provide copies of documents responsive to the request to the other party. Unless otherwise agreed, one set of copies shall be provided.[1/] However, either party may request to inspect the originals of any document produced or, in the case of electronically stored information, may request to inspect or receive the electronically stored information in native format. The party providing the documents responsive to the request shall assume all copying fees;

b. To the extent that electronically stored information is the subject of discovery in this action, the Parties agree to meet and confer and to agree upon the form or forms of production of that information; and

[1] Unless otherwise agreed, the parties shall provide one set of copies on CD-ROM, with each CD-ROM containing the following: images in single page Tiff format; a text file containing start Bates/end Bates for each document; and a cross reference file in Opticon log file format containing the start Bates, CD volume, and the full path to the image (assumes E as CD drive), with document breaks indicated by at "Y" at the end of the record.

c. Except as agreed upon in the Stipulation Regarding Preservation of Certain Electronically Stored Information and Privileged Materials (Attachment 1), all parties are ordered to preserve all records in their possession that are or may be material to this litigation until the conclusion of this litigation or until otherwise ordered by this Court.

6. Requests for Admissions - There will be a maximum of 125 requests for admissions by each party to any other party. Responses to requests for admissions shall be due 30 days after receipt of the request, unless extended by agreement of the parties or order of the Court.

7. Effect of Inadvertent Production of Documents - The inadvertent production of documents shall not, in and of itself, waive any privilege that would otherwise attach to the documents produced. The following procedure shall apply to any such claim of inadvertent production:

a. Upon learning of the inadvertent production, the producing party shall promptly give all counsel of record notice of the claimed inadvertent production. The notice shall identify the document, the portions of the document that were inadvertently produced, and the first date the document was produced. If the party that produced a document claims that only a portion of the document was inadvertently produced, the party shall provide with the notice of inadvertent production a new copy of the document with the allegedly privileged portions redacted. A party receiving documents produced by another party is under a good-faith obligation to promptly alert the producing party if a document appears on its face or in light of facts known to the receiving party to be privileged.

b. Upon receiving notice of inadvertent production, or upon determining that a document received is known to be privileged, the receiving party must promptly sequester the specified information and any copies it has and may not use or disclose the information until the claim is resolved. If the receiving party disclosed the information before being notified, it must take reasonable steps to prevent further use of such information until the claim is resolved.

c. In the absence of an agreement of the parties on the claim of inadvertent production and privilege, the burden is upon the party that inadvertently produced a document to promptly move for a ruling concerning the inadvertency of the production and the validity of the privilege claim. Upon resolution of an inadvertent production claim in favor of the producing party, the originally produced non-redacted documents and all copies will be returned to the producing party.

d. To the extent that either party obtains any information, documents, or communications through inadvertent disclosure, such information, documents and communications shall not be filed or presented for admission into evidence or sought in discovery by that party in *United States v. Kentucky Utilities Company*, Civil Action No. 5:07-CV-75.

C. Discovery Stipulations

1. The parties agree to be bound by the Stipulation Regarding Preservation of Certain Electronically Stored Information and Privileged Materials (Attachment 1).

2. The parties agree that there is no obligation to search for and produce electronically stored information in response to the parties' general discovery requests, nor to identify on a privilege log electronically stored information that may be responsive to such requests. However, the parties shall be obligated to search for and produce electronically stored

information in response to reasonable requests for production that expressly seek electronically stored information, and to identify on a privilege log any electronic documents sought to be withheld on privilege grounds in response to such reasonable requests for production

3. Privileged Materials Located in the Offices of Counsel for the Parties. The parties agree that, in response to general discovery requests, the parties need not search for and produce, nor create a privilege log for, any privileged material which is located in the offices of counsel for the parties at the Department of Justice, EPA, Kentucky Utilities Company, E.ON U.S. LLC, Louisville Gas & Electric Co., Baker Botts LLP, or Greenebaum Doll & McDonald PLLC. However, the parties shall be obligated to search for documents located in the offices of counsel for the Parties at EPA, Kentucky Utilities Company, E.ON U.S. LLC, and Louisville Gas & Electric Co. in response to reasonable requests for production that expressly seek documents from those offices, and to identify on a privilege log any documents sought to be withheld on privilege grounds in response to such reasonable requests for production.

D. Expert Discovery

Notwithstanding any provision in the Fed.R.Civ.P. to the contrary, the following terms apply to both the production of documents under Rule 26(a)(2)(B), Rule 34, and Rule 45, and to the timing and scope of expert deposition testimony.

1. Timing - All expert discovery will commence in time to be completed by October 31, 2008. Reports required by Fed.R.Civ.P. 26(a)(2) shall be due from the Plaintiff by June 13, 2008 and from the Defendant by July 15, 2008. Reports of rebuttal experts shall be due within 30 days of service of the report being rebutted.

2. At the time of submission of the expert reports, the parties will identify "the data or other information considered by the witness in forming his or her opinions," in accordance

with Fed.R.Civ.P. 26(a)(2). For the purpose of this Discovery Plan, except as noted below, "considered documents" shall be those documents that have been received and read or reviewed, furnished to the expert to be used in forming opinions (other than those determined to be not relevant after a cursory review), or taken into account by the expert, regardless of whether the expert actually relies upon the document, in forming his or her opinion. "Considered documents" specifically include the final versions of an expert's spreadsheets, tables or other quantitative analyses prepared in support of the final report.

a. Such "data or other information" may be subject to questioning during expert depositions. The party submitting expert reports will provide copies of all "considered" documents to the other party within 7 days of submitting the corresponding expert report(s). Where such "data or other information" was produced by either party in this litigation (or to EPA administratively), identification by Bates number will be sufficient. The party submitting expert reports shall identify information that is publicly available, but is required to produce such documents only if it is more burdensome for the party receiving the report to obtain them than it would be for the party producing the report, and upon a specific request. Such production shall take place within ten days of the request.

3. Notwithstanding paragraph 2, all drafts and pre-final versions of the expert's report shall be outside the scope of expert discovery. "Drafts and pre-final versions" shall be interpreted to encompass only the following documents:

a. Draft or preliminary spreadsheets, tables, or other quantitative analyses, outlines, notes, or preliminary drafts of the expert's report that were

created by the expert (or persons employed by or otherwise working for the expert) as part of preparing his/her report;

b. All communications between an expert and an attorney or other representative of a party, except data provided by an attorney or other representative of a party that is covered under Section III.D.2. above; and

c. Drafts and pre-final versions exchanged between the expert (or persons employed by or otherwise working for the expert) and another testifying expert. However, if one testifying expert ("Expert A") relies on a document authored by another testifying expert ("Expert B"), the version of the document relied on is subject to discovery (from Expert A), notwithstanding its status as a "draft" to the authoring expert (Expert B), unless all information considered by Expert A is contained in Expert B's final report.

4. To the extent documents or other information (a) relate to work performed in one of the other suits in the Utility Enforcement Initiative (i.e., all Clean Air Act New Source Review cases filed by the United States against electric utilities since November 3, 1999) or in the matter captioned *Sierra Club et al. v. Dayton Power & Light Co. et al.*, No. 2-04-905 (S.D. Ohio) (hereinafter *Sierra Club v. DP&L*), and (b) were created by either (i) a testifying expert designated in the above-captioned matter or (ii) a testifying expert designated in any of the other suits filed as part of the Utility Enforcement Initiative or in *Sierra Club v. DP&L*, such documents or other information are outside the scope of expert discovery, unless such documents fall into the category described in paragraph 2 and are not "drafts or pre-final versions" as defined in paragraph 3. Notwithstanding the foregoing, final expert reports and related exhibits,

depositions and related exhibits, affidavits, trial testimony and related exhibits generated by a testifying expert, irrespective of the action in connection with which it was created, shall be discoverable subject to claims of confidential business information.

5. With regard to expert depositions:

a. There will be no formal numeric limitation on the number of expert depositions;

b. Each party will pay for the time that party's own expert spends in deposition; and

c. The 7 hour, one-day limit imposed by revised Rule 30(d)(2) shall not apply to expert depositions. Except as otherwise set forth in this subparagraph, the deposition of an expert shall be limited to 14 hours in the case in which it is taken. Without agreement of counsel, no deposition of an expert shall last more than 7 hours in any calendar day excluding breaks. If a party anticipates either before or during a deposition of an expert that an expert's deposition will take longer than 14 hours, the parties shall discuss the need for an extension. If the parties in this case cannot reach agreement regarding an extension, the party taking the deposition may seek relief from the Court and bears the burden of demonstrating that fourteen hours is inadequate.

6. To the extent that either party obtains any information, documents, or communications, described herein as outside the scope of expert discovery, through inadvertent disclosure, such disclosure shall be addressed in accordance with Section III.B.7. above.

7. The following examples may be used as a guide for interpreting the scope of expert discovery permissible by the terms of this Discovery Plan:

a. A testifying expert relies upon data supplied by a non-testifying consultant. The party deposing the testifying expert may ask questions about the data supplied by the non-testifying consultant;

b. A testifying expert discusses the organization of his expert report with counsel. These communications with counsel need not be disclosed; and

c. Counsel supplies the testifying expert with data that the expert relies upon. The testifying expert may be questioned about the reliability of the data and the role the data plays in the expert's opinion.

E. Motions and Other Items

1. The parties should be allowed until April 30, 2008 to join additional parties and to amend pleadings.

2. All potentially dispositive motions should be filed by November 21, 2008.

3. All responses to dispositive motions should be filed by December 23, 2008.

4. All replies to responses to dispositive motions should be filed by January 23, 2009.

5. The parties continue to engage in settlement discussions.

6. A final list of witnesses and exhibits under Rule 26(a)(3) should be due from Plaintiff and Defendant by March 17, 2009.

7. Parties should have 14 days after service of final lists of witnesses and exhibits to list any objections under Rule 26(a)(3) or otherwise.

F. Pretrial Conference

1. The parties do not request a conference with the Court before entry of the scheduling order.

2. The parties request a pretrial conference approximately one month before trial.

G. Trial

1. This case should be ready for trial by June 8, 2009, and at this time is expected to take approximately two weeks.

Respectfully Submitted,

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ATTACHMENT 1

STIPULATION REGARDING PRESERVATION OF CERTAIN ELECTRONICALLY STORED INFORMATION AND PRIVILEGED MATERIALS

WHEREAS, the United States and Kentucky Utilities Company (collectively, the "Parties") are engaged in litigation in the above-captioned matter;

WHEREAS, the Parties mutually seek to reduce the time, expense and other burdens of discovery of certain electronically stored information and privileged materials, as described further below, and to better define the scope of their obligations with respect to preserving such information and materials;

NOW THEREFORE, the Parties stipulate as follows:

1. Preservation Not Required for Not Reasonably Accessible Electronic Information.

a. The Parties agree that except as provided in subparagraph b the Parties need not preserve the following categories of electronic information for this litigation:

i. Data duplicated in any electronic backup system for the purpose of system recovery or information restoration, including but not limited to, system recovery backup tapes, continuity of operations systems, and data or system mirrors or shadows, if such data are routinely purged, overwritten or otherwise made not reasonably accessible in accordance with an established routine system maintenance policy;

ii. Voicemail messages;

iii. Instant messages that are not ordinarily printed or maintained in a server dedicated to instant messaging;

iv. Electronic mail or pin to pin messages sent to or from a Personal Digital Assistant (e.g., BlackBerry Handheld) provided that a copy of such mail is routinely saved elsewhere;

v. Other electronic data stored on a Personal Digital Assistant, such as calendar or contract data or notes, provided that a copy of such information is routinely saved elsewhere;

vi. Logs of calls made from cellular phones;

vii. Deleted computer files, whether fragmented or whole;

viii. Temporary or cache files, including internet history, web browser cache and cookie files, wherever located;

ix. Server, system or network logs; and

x. Electronic data temporarily stored by laboratory equipment or attached electronic equipment, provided that such data is not ordinarily preserved as part of a laboratory report;

b. Notwithstanding subparagraph a, if on the date of this agreement either Party has a policy established by management that results in the routine preservation of any of the categories of information identified in subparagraph a, such Party shall continue to preserve such information in accordance with its policy. However, the Parties shall have no obligation, in response to general discovery requests, to search for, produce, or create privilege logs for electronically stored information covered by this subparagraph b.

2. Obligations Related to "Draft" Documents and "Non-Identical" Documents. For the purposes of preserving potentially discoverable material in this litigation, and for purposes of discovery in this litigation, the Parties agree that a "draft" document, regardless of whether it is

in an electronic or hard copy form, shall mean, "a version of a document shared by the author with another person (by email, print, or otherwise)." In addition, a "non-identical" document is one that shows at least one facial change such as the inclusion of highlights, underlining, marginalia, total pages, attachments, markings, revisions, or the inclusion of tracked changes. The Parties agree that they need not preserve for discovery a document before and after every change made to it, so long as "draft" documents, as defined by this paragraph, are preserved. The Parties further agree that they shall preserve any presently existing "non-identical" documents that are relevant to the subject matter involved in this action. A document that is identical on its face to another document, but has small detectable differences in the metadata, shall be considered an identical copy.

3. No Discovery of Material Not Required To Be Preserved. The Parties agree not to seek discovery of items that need not be preserved pursuant to paragraphs 1-2, above. If any discovery request is susceptible of a construction which calls for the production of items that need not be preserved pursuant to paragraphs 1-2, such items need not be provided or identified on a privilege log pursuant to Fed. R. Civ. P. 26(b)(5).

4. Preservation Does Not Affect Discoverability or Claims of Privilege. The Parties agree that by preserving information for the purpose of this litigation, they are not conceding that such material is discoverable, nor are they waiving any claim of privilege. Except as provided in paragraph 4, above, nothing in this stipulation shall alter the obligations of the Parties to provide a privilege log for material withheld under a claim of privilege.

5. Other Preservation Obligations Not Affected. Nothing in this agreement shall affect any other obligations of the Parties to preserve documents or information for other

purposes, such as pursuant to court order, administrative order, statute, or in response to other anticipated litigation.

6. Entire Agreement. This stipulation contains the entire agreement of the Parties relating to the subject matter of this stipulation, and no statement, promise, or inducement made by any Party to this stipulation that is not set forth in this stipulation shall be valid or binding, nor shall it be used in construing the terms of this stipulation.

7. Effective Upon Signing. This stipulation is effective upon execution by the Parties, without regard to filing with the Court, and may be signed in counterparts.

8. Definition of "Party". For the purposes of this Agreement the term "Party" means:

a. Kentucky Utilities Company, and its counsel, as well as any other person who possesses information within the custody and control of Kentucky Utilities Company;

b. the United States Environmental Protection Agency, the United States Department of Justice, and any other person who possess information within the custody and control of the United States Environmental Protection Agency or the United States Department of Justice.

9. Sanctions.

a. No Party shall seek sanctions pursuant to the Federal Rules of Civil Procedure, the contempt powers of the Court, or any other authority against the other Party for the failure to preserve electronic information that is not required to be maintained pursuant to paragraph 1;

b. Nothing in this agreement shall give rise to a claim for sanctions for failure to preserve information prior to the effective date of this agreement.

10. Meet and Confer Requirement. The Parties agree that before filing any motion with the Court regarding electronic discovery or evidence, the Parties will meet and confer in a good faith attempt to resolve such disputes.

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